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THE
LAW
OF
EVIDENCE,
BY
LORD CHIEF BARON GILBERT.

CONSIDERABLY ENLARGED
By C A P E L L O F F T,
BARRISTER AT LAW.

TO WHICH IS PREFIXED,
Some ACCOUNT of the AUTHOR; his Abstract of LOCKE's Essay;
and his ARGUMENT in a Case of HOMICIDE in IRELAND.

VOL. II.

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БИБИЧЕВ

Любовь Семеновна ГИЛЬДЕНСТ

КОММЕРЦИАЛЬНЫЙ АКАДЕМИЧЕСКИЙ

КАТЕГОРИИ



СТАВРОПОЛИСКАЯ

СОВЕТ ПО ОБРАЗОВАНИЮ И АКАДЕМИЧЕСКОМУ УЧРЕЖДЕНИЮ
САНКТ-ПЕТЕРБУРГСКОГО КОММЕРЦИАЛЬНОГО УЧРЕЖДЕНИЯ

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1921

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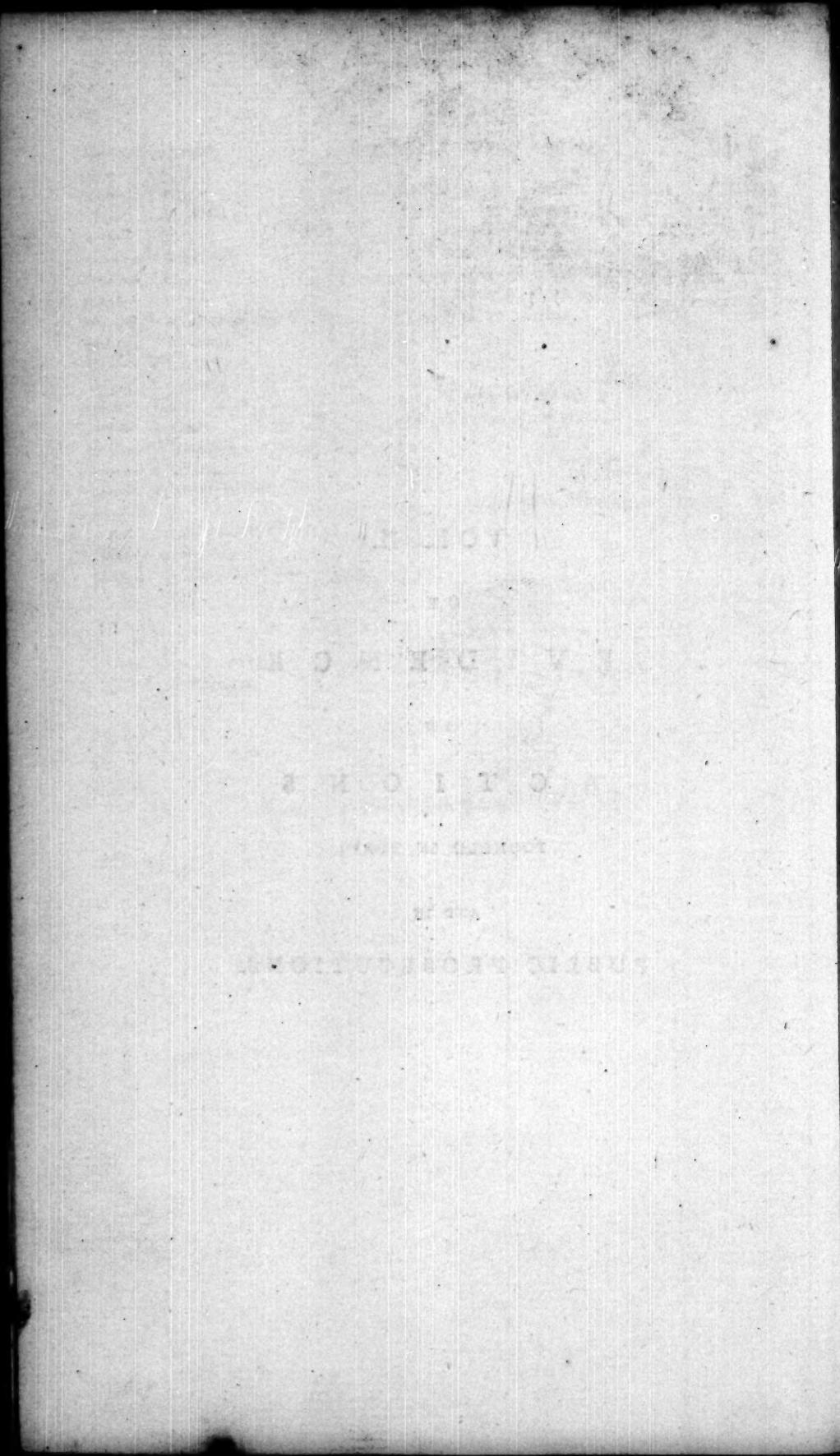
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END of the Alphabetical Cases to VOL. II.

VOL. II.
OF
EVIDENCE
IN
ACTIONS
FOUNDED IN TORT;
AND IN
PUBLIC PROSECUTIONS.



ERRATA, ADDENDA, &c.
To VOL. II.

PAGE 446. l. 20. after "Distinction" dele, insert .	PAGE 468. l. 11. read "vest?"
— 468. l. 11. vest.	— 479. l. 22. insert Ch. IV.
	— 510. l. 17. the Opinion of the Court was against the Plaintiff, on the Claim of gleaning BARLEY. Vide Blackstone's Term Rep. C. P. Tr. 28 G. III. p. 51.—3.
	— 714. l. 19. add Marg. Ref. R. v. Hedges, O. B. May 1779. L. Cr. L. 208. Ca. 90.
	— 759. l. 14. Marg. Ref. R. v. Hug- get et al.

When the Account of the *Editions of THE LAW of EVIDENCE* was given in the *Preface* p. xxx. the Dublin Edition had not been seen. The Marginal References in that Account are misplaced. The whole should stand thus.

Dublin 1754. — Qto; by subscription p. 199 excl. of Index.

London reprinted 1752. Octavo * 1 S.

1756. 2d Ed. p. 289.

1760. 3d

1777. 4th p. 286.

* This Edition LOFFT has not been able to procure: all the others have been examined for the present Publication, and are now in his Possession.

O B S E R V A N D A.

PAGE 33. See MORGAN's Observation in support of this Objection in the *Introduction* to the first Vol. of his *ESSAYS* p. 95.

— 58. Mr. Morgan p. 129. seems to think the hand-writing of the Person who administered the Oath and signed the *Jurat* necessary to be proved to entitle an Answer to be read in Evidence. But perhaps not; as he is a known officer.

— 95. Mr. Morgan queries the Distinction between the *Practice* in B. R. and that in C. B. and also whether on *Profer* the Deed is ever actually brought into Court. p. 154.

— 116. Mr. Morgan doubts whether the Name in the *hand-writing* in the Body of the Will be a sufficient signing: and whether the statute have not required signing as a distinct *substantive Act*: and says, the *Court of Exchequer* in a late Case were of that Opinion. p. 178—9.

— 284. The Issue here mentioned is collateral. The words *Plaintiff* and *Defendant* therefore must be changed in this Passage reciprocally.

— 326. l. 32. *solvit ad diem* is now pleadable by the Statute without a discharge in writing. Vide Morg. 310. 4 A. c. 16. § 12.

— 339. As to the Right of a *Diffisor* to set off Repairs Mr. M. doubts; and apparently very justly. p. 418.

20 AUGUSTA

CHAPTER II.

Of Disseizin.

“ DISSEIZIN is when one Man dispossesseth another Comm. II;
c. 13.

“ of Lands or Tenements; and thus converts his *pos-*
“ *session* to a *Right*: and this Right may be either a
“ Right of *Possession*, so that the party shall reinstate
“ himself in the *actual Seizin* by *ENTRY*, or it may be
“ a mere Right, and then the *LAW* only can reinstate,
“ when he resorts to its aid by applying to the proper
“ Mode of Remedy: and this is denominated a **RIGHT**
“ of **ACTION**.

“ Thus if a man *diffeize* me, I have, during the
“ Life of the *Diffeizor*, a *Right* of *Entry* (*par voie de*
“ *fait*) within a limited Period: but if he die, and the
“ Land *descend* to his *Heir*, who entereth; now by reason
“ that in the *Heir* an *apparent Right* is connected with
“ the *actual possession*, the mere *Entry* is taken away,
“ and I have only a *Right of Action* for *recovery of the* Co. Litt. § 385.
“ *possession*.

“ This Right of regaining *possession* in a *possessory Ac-*
“ *tion* may by *Lapse of Time* cease: and then both
“ the *Possession* and *Right of Possession* are said to be
“ *divested*, and the party is put to his *Action* for re-
“ *covery of his Right*.

What may or may not be given in Evidence on the General Issue.—NUL DISSEIZIN.

32 H. VIII.
c. 2.
L. N. P. 115.

“ And after *sixty* Years even this *mere* Right is no longer protected by the Law : but the party is barred “ of his WRIT OF RIGHT for its Recovery.

“ Nor of his own Possession shall he have a Writ of Right (the ultimate Remedy applicable to *real* property) after *thirty* Years.

Salk. 285.

“ The Entry to support the Claim must be on the Land : unless there be some special reason proved to exempt from this necessity.

“ The Possession of one *Joint-tenant* is the Possession of another so as to prevent the Prescription from attaching.

Upon this Issue a Man cannot give a *Release* in Evidence made *after* the *Disseizin* committed ; but it ought to be pleaded : for this Evidence *admits* the *Disseizin*, and at the same time shews that it was not lawful for the Plaintiff to bring his Action ; and so it is good Matter of *Justification*.

But if the *Release* had been before the *Disseizin*, then it had been good *Evidence* : as if a Man seised of a *Rent-charge* releases the Rent, and then demands it, and it is denied : this *Release* is good Evidence on “ this general” Issue : because there is now, “ *precedently*,” no *seizin* or *Freehold* of the Rent in being ; and therefore there could be no *Disseizin* of it.

If a Man bring an *Affize* for *Common* of *Estovers* when the House is *down* to which the *Estovers* belong, the Defendant may plead, *Nul Tort, nul Disseizin*, and give this Matter in Evidence : for there is no wrong, nor any *dissfeisin*, if it become impossible, by the party’s own fault, that the *Estovers* should be rendered him.

C H A P T E R III.

Of EJECTMENT.

“ We are now to treat of *Ejectment*. The last Issue
“ was applicable to the *Right*; and that of *Tenements*
“ *incorporeal* as well as other; this to *corporeal*, and
“ directly to the *possession*.

“ No Species of *Action* has been more beneficially
“ extended, or more exalted beyond its original Limits
“ than this. In its beginning it only gave *Damages* for
“ *Dispossession* of a *Chattel Interest*, and did not even
“ recover the *Term*. It was so far improved by judi-
“ cial Enlargement of the Remedy about the time of
“ the fourth *EDWARD*, as to be considered to intitle to
“ a *Writ of Possession*: and in that distinguished *era*
“ of legal Policy, with respect to *real Property*, the
“ reign of *H. VII.* it became established in its present
“ great purpose of trying *TITLES* of *FREEHOLD*. This
“ was done, first, by *actual ENTRY* of the person
“ claiming *TITLE*; who sealed and delivered a *LEASE*
“ upon the Premises, and was afterwards either *actually*
“ *OUSTED* by the former Tenant in possession, or, *ap-*
“ *parently at least*, by some other person (most gene-
“ rally by *Agreement*) who, in the Language of the
“ *equitable Fiction*, is called the *CASUAL EJECTOR*.

Comm. III.
Ch. 11.
L. N. P. III,
Ch. 3.

“ Now to maintain *EJECTMENT* against the *TE-*
“ *NANT* in *POSSESSION*, or against this *casual EJECTOR*,
“ the *Plaintiff* must prove his *Title*, *under his LESSOR*,
“ to be the better one, which is the *MERITS*; and he
“ must prove *LEASE*, *ENTRY*, and *OUSTER*, which
“ now generally are the *FORM*.

“ We observe that *Lease*, *Entry*, and *Ouster*, now
“ generally are the *formal*, or more accurately yet,
“ the *fictitious* part of the *Action*: since for a Cen-
“ tury past, by an invention ascribed to the Lord *Chief*
“ *Justice ROLLE*, analogous to the *fictitious Action* of
“ *COMMON RECOVERY*, the *casual Ejector* is an *ideal*
“ *person*,

Of EJECTMENT.—Fictitious Form.

“ person, in whose Name NOTICE is given to the Tenant in possession to defend his TITLE, or that Judge-
 “ ment will go against him by default, the casual Ejector
 “ having no Title. Upon this, if the real Tenant
 “ chuses to defend, he is admitted by RULE of COURT,
 “ on his consenting to confess LEASE, ENTRY, and
 “ OUSTER, so that the REAL QUESTION, the TITLE
 “ of the LESSOR of the Plaintiff, who is the person
 “ claiming RIGHT of FREEHOLD in the Lands, may
 “ be brought to Trial.

“ And these FICTIONS may not be carried beyond
 “ the purpose of every legal Fiction; which is, to try
 “ a Right with the greater clearness and facility, or to
 “ introduce a Remedy to which Equity entitles the party.
 “ And therefore a Tenant in possession shall not be ousted
 “ without Notice; and the strict Form of Entry, Lease,
 “ and Ouster, must be pursued where there is no actual
 “ Occupant of the Premises; and Tenants are bound,
 “ under Forfeiture of three Years Rent, to give Notice
 “ to their LANDLORD, who is particularly se-
 “ cured in his Right to be admitted a CO-DEFENDANT.
 “ And as the Right is tried indirectly, the Judgement is
 “ NOT conclusive; though the Statute of Limitations
 “ taking away the Right of Entry where the Possession
 “ has been under an adverse Claim for TWENTY Years,
 “ an Ejectment is consequently limited to this Period.

21 G. II.
c. 19.

21 T. I. c. 16.

“ And where the Question originates from the COURT
 “ of CHANCERY, that Court, after the Matter has been
 “ sufficiently tried, will grant an INJUNCTION on the
 “ Merits to prevent vexatious proceedings in Ejectment.

“ Though

" Though it obviously results from the Nature of the subject, it may here be mentioned, that on a FINE with PROCLAMATIONS, *actual ENTRY* must be proved to support an Ejectment: and the Action must be commenced within one Year after making such ENTRY.

TITLE II.

" And in examining the Process by EJECTMENT, we will now consider it in its ancient strictness, where none of the Requisites are confessed: since for want of an *actual occupant*, or by reason of a Fine with Proclamations, that strictness may still be necessary to be pursued."

TITLE III.

And here " upon" the Issue *Not guilty*, in EJECTMENT, we shall treat,

First, of the LESSORS;
Secondly, of the LESSEES;
Thirdly, of the ENTRY.

Par. I.

First, of the LESSORS: and it is to be known that in this Issue they are to be the same in the Allegation and in the Evidence: for if it appears by the Proof that the same persons did not and could not transfer that Interest which is said to be transferred by them in the Declaration, the Plaintiff hath not proved his Declaration: for all Courts of Justice must go *secundum allegata et probata*: if therefore any person doth not maintain by his *proofs* the matter he hath *alleged* to the Court, he must fail of the Justice he would demand on those Allegations: and with this agrees the Rule of the Civil Law: *quod Probationes sint conformes Libello.*

If

Cro. Jas. 166.
2 Danv. Abr.
230, pl. 1.
Show. 342.
2 Ventr. 214.
Comb. 190.
CARTH. 224.
Comm. II. 181.

If a Man declares of a *joint Lease*, and on *Not guilty*, gives in *Evidence* the *Lease* of two *Tenants in common*, this doth not prove the Declaration: for *"joint Tenants have the undivided possession of one entire Estate; but Tenants in common have a severality of Estate, notwithstanding the unity of possession: therefore in effect"* the Declaration alleges that they both demised the *whole*, and the *Evidence* is that *each* of them demised their *several distinct parts* of the Land in Question: this Proof, "of course," asserts not the Contract alleged in the Declaration.

Hil. Aff. 1700,
par Treby.
Co. Litt. 42.
R. Rep. 299.
Rayns. 142.

If a Man declares of a *joint Lease*, and gives in *Evidence* the *Lease* of *Tenant for Life*, and of him in the *Reversion*, this is no Proof of the Declaration: for during the *Life* of *Tenant for Life*, it is his *Lease* of the *whole Lands*: and therefore this is no proof of the Contract alleged in the Declaration: "for the *Estate of Tenant for Life and of the Reversioner* are *altogether several*, and accordingly fall within the preceding Distinction, and upon this Principle the following Case was determined:

T. R. 36.
*Ludford v. Bar-
ber.*
Hil. 26 G. III.

"On Action of *Covenant for Rent* in arrear, the Declaration stated, that before and at the time of making the Indenture therein after mentioned, one *Bracebridge Ludford*, and *John Ludford*, the Plaintiff, were respectively seized of the aftermentioned Premises;

"that

" that is to say, the said *John Bracebridge Ludford*, in
" his demesne as of freehold for term of his life, and the
" said *John Ludford* of the reversion thereof, expect-
" tant on the determination of the said Estate of the said
" *John Bracebridge Ludford*, in his demesne as of fee:
" and being so respectively seised, by a certain inden-
" ture made at *Nuneaton*, in the County of *Warwick*,
" on the 31st day of *January*, 1770, between the said
" *John Bracebridge Ludford* and the said *John Ludford*,
" of the age of thirteen years, son and heir apparent
" of the said *John Bracebridge Ludford*, of the one
" part, and the said *John Barber* (the Defendant) of
" the other part, the said *John Bracebridge Ludford* and
" the said *John Ludford* did, for the considerations
" therein mentioned, and each of them did according to
" their several and respective estates in the premises, de-
" mise, grant, lease, &c. all those several MINES,
" &c. of COAL; to have and to hold the said mines,
" &c. to the said *John Barber*, his executors, &c. from
" the 29th of *September* then last past, for the terms of
" 21 Years, and 19 Years, making together 40 Years,
" at a certain rent, payable in time and manner as by
" the Declaration specified for every load of coal:
" and also a certain annual Rent for such lands as he
" should have occasion to use for the said Coal. Then
" followed an express Covenant for payment of Rent;
" and a Covenant to make up a certain Rent (including
" the

" the mine-rent above of 75*l. per Ann.* the first of
 " such payments to commence as soon as the sale of a
 " certain kind of coals of another Tenant (specifying
 " them) should cease to produce 100*l. per Annum.*

" The Declaration stated the Entry pursuant to the
 " Demise, and the continuance of the Defendant in
 " possession: the death of *John Bracebridge Ludford* (the
 " elder) on the first of *March*, 1776; and that the said
 " *John Ludford*, after he had attained his Age of
 " twenty-one Years, to wit, on the first of *Feb.*
 " 1779, did duly execute and confirm the said Lease, for the
 " remainder of the said Term, to the said *John Barber*: it
 " stated, that afterwards, to wit, on the 3d of *De-*
 " *cember*, 1780, and on diverse days and times between
 " that day and the first of *June*, 1784, the Defendant
 " did get and sell a certain great quantity of *coals* par-
 " ticularly charged in the Declaration, and became liable
 " under his said Covenant to pay a certain large sum
 " (also set forth) to the Plaintiff, and that he hath not
 " paid the same.

" There was another Count charging a breach of
 " Covenant respecting the certain rent of 75*l.* to be
 " made up.

" The Defendant pleaded generally; no Rent in
 " Arrear.

" And

" And farther specially pleaded that the said Plaintiff ought not to have or maintain his aforesaid Action, for that the said John Ludford did not, at the time in the Declaration mentioned, nor at any time during the life of John Bracebridge Ludford, nor till two Years after his decease, execute the said Lease: and that upon the Death of the said J. B. Ludford, before any of the Rent or Money in the said Declaration mentioned became due or payable, the said Lease and Demise did cease and determine.

" There were other Pleas on different Grounds not material to this point.

" On these Pleas Issue was joined in *Demurrer*.

" It was contended for the Plaintiff, that the Defendant, by having executed the Lease, was estopped from saying that it was not a joint Lease.

" The COURT held there ought to have been a *re-execution* of the Lease after the Father's Death.
" And agreed, that on the Death of the Tenant, the Lease was absolutely void. And Judgement was accordingly for the Defendant."

By the Reporters cited.
Co. Litt. 230 b.
n. 1. 231, a.
Cwmp. 201,
482. which last
is in point.
Dougl. 53.

If a Man declares of a joint Lease, and upon the Evidence it appears that A. B. and C. were joint Tenants for Years; and that C. let his part to A. and A. and B. made a Lease to the Plaintiff: it seems that this Evidence doth not answer the Matter alleged in

the Declaration: because, as to a third part of the Land, A. is Tenant in common.

Cro. Ja. 23.

The best way, in all these Cases, when it is any way doubtful, is, to make a joint Lease; and for the Lessee to enter and make a second Lease, and then to declare on the second Lease generally.

A Man declares of a joint Lease by Baron and Femme; and gives in Evidence a joint Lease made and delivered by them on the Land; this maintains the Declaration: for the Wife may make a Lease of her own Land during the *Coverture*, and this is not void, but voidable only; for though the Wife's Contract be void during the Coverture to bind the personal Estate of the Husband, in which she hath no property, yet to bind her own Land, in which she hath a property, continuing, during the Coverture, her Contract is not void, but voidable; and if the Contract stand till after the Coverture, she may, if she please, confirm it.

Good.

" And this depends on a principle relative to the
 " Right of the Wife to CONFIRM a Lease made dur-
 " ing Coverture, by re-delivery or other sufficient Act,
 " when she becomes sole, which was fully recognized
 " in the following Case:

Mic. r; G. III.
 Goodright ex
 Dian.
 Elizabeth Carter v. Strahan
 et al.
 Cwyp. 201.

" In *Ejectment* for an House in *Thames-street*, the
 " Lessor of the Plaintiff shewed a Right under the
 " Will of one James Roberts, dated July 14th, 1710.
 " The Defendants claimed under one Greening, who
 " had been in possession from the Year 1737. But it
 " was shewn that he had accounted for the Rents and
 " Profits to the Lessor of the Plaintiff and her Hus-
 " band,

" band, so as to take it out of the Statute of Limitations.

" By Indenture, bearing Date 19th July, 1737,
" between *Charles Carter* and *Elizabeth his Wife*, on
" the one part, and *William Greening* on the other,
" reciting that the said *Elizabeth* was or would be en-
" titled to the inheritance of the said House in *Thames-*
" *street*, and of certain Houses in *Reading*, under the
" *Will* aforesaid, and that the said *Charles* (the Hus-
" band) was then indebted in 102*l.* to *Greening*, and
" that he, at the special instance of the said *Charles*
" and *Elizabeth his Wife*, had agreed to furnish them
" with a farther sum of 144*l.* by way of mortgage,
" for their maintenance, till the foresaid Estate should
" vest in *possession*, they, on these Considerations,
" *mortgage* the Premises to *Greening*. The Deed was
" executed both by the Husband and *Wife*; and was a
" Lease for *ninety-nine Years*, with a *peppercorn re-*
" *served*.

" Three Exhibits were produced subsequent to the
" Death of the Husband.

" The first was an Account stated, out of which was
" deducted an Article for *interest* due; in this was
" included a receipt for rent for the house in *Thames-*
" *street*, from 1755 to 1760; the balance struck, and
" signed *Elizabeth Carter*.

" The second was a *surrender* of one of the said
" houses in *Thames-street*, 23d May, 1763, to the ex-
" cutors of *Greening* the *Mortgagee, co nomine*.

*Confirmation by Delivery of Deed, where the original
Delivery void.*

" The third of the same date was an Order to the
" Tenant to attorn accordingly to the said Executors ;
" both signed as the precedent, and witnessed.

" Lord MANSFIELD, in delivering the Opinion of
" the Court, observed, that in point of *Form*, a *Fine*
" was the proper Mode for a *married Woman* to pass
" a right in land : that here, she, having executed a
" conveyance by Deed without *Fine*, the Question was,
" whether it was originally void, or but *voidable* : and
" whether, if only *voidable*, the Facts in Evidence had
" confirmed it.

" That whatever exception *Leases* in favour of the
" *cultivation* of Land might make to the supposed
" rule of the Deed of a *married Woman* being *void*,
" the Court could not refuse to see that this, though
" in *Form* a *Lease*, was in substance and intent merely a
" *Mortgage* : but that the rule of the absolute void-
" ness of a Deed executed by a *Femme covert*, other-
" wise than by *Fine*, had been supposed without ade-
" quate cause : for that *Perkins* says an infant, or man
" in *dureffe*, cannot, after these incapacities removed,
" deliver the deed a second time with effect ; for as to
" them, their second delivery is void ; but that if a
" married Woman deliver a Bond, or other Writing,
" as her *Deed*, this *Delivery* is merely void : and there-
" fore, if after the death of her *Husband*, she being
" sole, deliver the same Deed again, the second *Delivery*
" is good and effectual.

" His Lordship remarked that the *Year Books* con-
" firmed this Distinction of *Perkins*, that the Deed of

" a *Femme covert*, after the *coverture* determined, is not
" to be re-executed but only re-delivered.

" That **DELIVERY** is an *Act en Païs*, of which
" the JURY decides upon the Facts: and that by the
" Authority of Lord COKE, accordingly, circum-
" stances might be equivalent to an *actual Delivery*.
" That here the Mortgage Deed being in possession of
" the *Mortgagee*, the *Wife*, after the Death of the
" Husband, *surrenders possession* (of other houses included
" in the same instrument) to the Executors of the *Mort-
gagee*, and orders the Tenant to *attorn*.

" That this was a clear acknowledgement that the
" Deed was *her's*; and of her confirmatory *Agree-*
" *ment* when *sole*, that the Defendants should enjoy
" according to the Terms of the Deed: and conse-
" quently these Facts equivalent to a *re-delivery* of the
" Deed.

" But if a Man declares of a joint Lease by *Baron*
and *Femme*, and gives in Evidence a joint Lease deli-
vered by *Warrant of Attorney* on the Lands, this will
not maintain the Declaration: for, though the Wife
herself may do any *Act* relating to her Estate, yet she
cannot constitute an *Attorney* to do it; and therefore
his Entry and Delivery of the Lease, by virtue of a
Warrant of Attorney from the Wife, is wholly void:
for she cannot put any person in her place to transact
for her, who has already devolved all Authority upon
her Husband.

Cro. Ja. 617.
Bendl. 134.
3 Co. 35. b.
2 Saund. 213.

If there be several Coheirs, they must make several
Leases to try their Title: because when they demise,

Moor, 682.
2 Keb. 700.

their Leases operate according to their several Interests, and the Lessee enjoys from each several person according to his several Interest: and therefore if he should declare in such Case that the Coheirs *demised* so many Acres as the whole contains, he would fail in his Proofs; for each demises according to his own share only. And therefore the safest Method is, where their several parts are unknown, to join in a Demise of the whole, and for the Lessee to enter and demise over; and to try the Title in Ejectment by a general Declaration on the second Lease: "it would be otherwise, "if they were *Joint-tenants*; for these being seised, as "our ancient Law phrases it," *per my et per tout*, "each may be said to demise the whole.

L. N. P. 107.

Litt. § 553.
3 Mod. 36.
R. Abr. 293.
Salk. 90, 1.
Str. 78—106.

"It hath been held," if in Ejectment the Plaintiff declares for a Manor, he must prove the *Attornment* of the Tenant: for a *Manor* consists partly in *Demesnes* and partly in *Services*: without *Services* there is no *Manor*, and without *Attornment* there is no *Service*.

Par. 2.

Secondly, of the Lessee.

The *Lease* proved must agree with the *Lease* alleged in the Commencement of the Term, in the Land and in the Number of Acres: for if it be otherwise, it appears to be another Contract; for *those Things cannot be the same which materially differ*: and, if there be not the same Term, the same Land, and the same Quantity of Land, it is a material difference.

First, as to the Commencement of the Term.

If

If a Man declare of a Lease, made the 30th of March, the eleventh Year of the King, to hold FROM the Feast of the Annunciation next before, for the space of a Year, and he gives in Evidence a Lease made and Sealed the 25th of March, for one Year from thence next ensuing, "it hath been said," this will not maintain his Declaration: for the Lease which is alleged, differs in Commencement from the Lease which is proved: for the Lease alleged begins FROM the Feast of the Annunciation, so that the 25th of March itself is excluded; but the Lease proved is a Lease made "on" the 25th of March, for one Year from thence next ensuing, so that here the 25th of March, or Feast of the Annunciation is included.

For when a Man passes an Interest from the Date, or, from thenceforth, which is all one, the Interest passes immediately: for Date either signifies the immediate ACT of Delivery, or else the Day or Time of the Delivery: and when an Interest passes from the Date, it is more for the Advantage of the Grantee that the Date should be reckoned the very ACT or Minute of Delivery; for to pass a present Interest from the Date or immediate Delivery, is more for his Advantage than that it should begin to morrow: "but it hath been contended, that" these Words, from the DAY of the Date, will never admit of such a Construction, that the Interest should pass from the immediate Delivery before the Date is ended.

5 Co. 2. a. b.
2 R. Abr. 520.
pl. 1.

But where the Date is only a Point of Computation, and the Interest doth not begin from thence, these Words from the Date, henceforth, and, from the Day of the Date, are all one: and, therefore, if a Man declare of a Lease, made the 12th of December, to begin from the Day of the Date, and upon *Not Guilty*, he gives in Evidence a Lease made the 1st of December, HABENDUM, from thenceforth, and delivered the 12th of December, this will maintain the Declaration; for where the Lease is delivered the 12th of December, and could not begin in Interest till the Delivery, the Date is only a Point from whence the Computation of the time commences, and it is more for the Interest of the Lessee that it should be excluded out of the Term; because he could have no Advantage in including it, his Interest not being then begun, and it is thus for his Disadvantage to include it, as the Term would end so much the sooner than it would on that Construction: and this has been held always a Rule, that when a Word is capable of two Senses, that Sense should be taken that makes most strongly against the Grantor, and most for the Advantage of the Grantee*: and this we take to be a very certain Maxim in the Construction of Deeds: for no man can be intended to hurt himself by the Extent of his own Donation, the Rules of self-preservation do sufficiently defend men from any wrong

* *Contra proferentem Verba fortius accipiuntur.*

to their own Interest: it is therefore fit that the Laws of Civil Society should provide for the Interest of the Grantee, that he might not be wronged by too narrow a Construction; and, therefore, the most beneficial must always take place: besides, this Rule is farther friendly to Justice in that it avoids all manner of *Deceit* in any Grant, and puts a full End to all Controversies about them: for without this Rule, Men would affect intricate Words, and so every Grant would be subject to be overthrown, or, at least, shaken by the Debate about it's Meaning.

A Man declares of a Lease, made the 5th of *May*, in the tenth Year of the King, *Habendum* from the Feast of the Annunciation last past, for twenty one Years *from thence next ensuing*: the Jury found a Lease made the 5th of *May*, in the tenth Year of the King, *Habendum* from the Feast of the Annunciation then last past, for twenty one Years next following the Date of the said Indenture: the Lease found by the Jury, is the same with the Lease alleged; for both being *from the Feast of the Annunciation then last past*, for twenty one Years, they are both expressly for twenty one Years and no more; so that these Words, *next following the Date of the said Indenture*, are utterly repugnant and void.

"And, indeed, in itself," the Date is no material part of the Deed; therefore, if a Man declares of a Lease,

Hob. 18.
All. 75.
St. 118. Roll.
Abr. 859.
Pl. 11.

⁴ Leon. 74.
⁵ Co. 45.

Lease, dated the 14th of December, to begin from Christmas last for three Years, and he gives in Evidence a Lease, dated, sealed and delivered the 13th of December, to begin from Christmas last for three Years, this Lease in the substantial part of it being the same, in Commencement and in the Quantity of the Lands, though it differ in the circumstantial and immaterial part of the Contract, yet it is good Evidence to maintain the Lease alleged: for those things are "morally" the same that do not materially differ. Also the Declaration says, that *I. S.* the 14th of December demised it, which is the Matter of Substance in setting out the Demise: and that is proved to be true by the Evidence offered; for if he demised it on the 13th, it continued demised on the 14th also.

" But when we have occasion to treat of INDICTMENTS and Evidence in support of them, we shall see farther proof of the Analogy and Extent of this Rule."

" Yet" if a Bond be alleged to be dated the 2d of August, and the party gives in Evidence a Bond dated the first of August, this seems not to maintain the Issue: because, though the Bond be the same in all circumstances but that of the Date only, yet might they have been different Contracts: for a Man may oblige himself in 20*l.* one Day, and in another, 20*l.* another Day to the same Person; so *prima facie*, if the Dates do not

agree

agree, without more Evidence, the Plaintiff fails in his Issue : so that if a Man declares of a Bond, dated the 2d of *August*, and the Jury find a Bond, dated the 1st of *August* ; the Court who are not Judges of probable and improbable, and who cannot intend a Bond to be delivered before its Date, cannot adjudge them to be the same. And this is not like the Case of *Leases* : for if the Leases agree in all circumstances but the Date only, they pass the same Lands for the same Term, and are therefore in effect the same ; but two Bonds may agree in all things but the Date, and be two distinct Bonds, since they may be for two distinct twenty Pounds ; and, therefore, without an Identity of Date, they are not, *prima facie*, Evidence of one another.

But if a Man declares of a Bond made the 1st of *August*, and upon the *proferit*, it appears to be a Bond dated the 2d of *August*, upon *Demurrer*, the Court cannot "even then" adjudge them to be the same : for the Court then are not to intend any thing relating to the Fact but what appears : (inasmuch as they are not Judges of the probable and improbable, but the Jury only, they cannot judge these Contracts to be the same that differ in appearance, for that were to take on themselves a Judgement of the Fact) ; and, therefore, they must take them to be as set forth ; and so they are different Contracts. But if, after Oyer of the Bond, the Defendant pleads *Non est Factum*, and the Jury find that it is his Deed, the Court will intend the Bond dated the 1st of *August*, was delivered the 2d of *August*,

- 21 E. IV. 38.
Ld. Raym. 335.
2 Salk. 463.
5 Mod. 281.
Comb. 477.
3 Salk. 73.
Holt. 502.
12 Mod. 193.

Final Adjustment of this Point.

August, in support of the Right: for a Deed might be dated and sealed one Day, and delivered afterwards on another, and so the Declaration good of a Bond made the 2d of *August*.

*Hab. sup.
Litt. 6.*

But if the Bond was alleged to be made the *first* of *August*, and upon *Oyer*, it appears to be dated the *second*, it seems that after the Deed is found, this will be a good Objection in Arrest of Judgement: for the Bond cannot be intended to be delivered before its Date, for the Date is the time of its sealing, and the Deed cannot be delivered as a Deed before it has the Essentials of a Deed by the seal of the Party: and so it cannot be helped by the Verdict.

*2 Co. 4, 5.
Goddard's Case.
Cro. Ja. 136.
Cro. Car. 77.
2 R. Abr. 677.*

But if a Bond is alleged to be dated the *first* of *August*, and so it appeared to be upon *Oyer*, yet if the Jury find that this Bond, dated *first* of *August*, was in reality sealed and delivered any other Day, it is well enough: for the Date is not a material Part of the Contract; and if the Contract offered to the Court was sealed and delivered at another time, yet it is the Deed.

Dall. 205.

If a Man declares of a Lease dated the 28th of *January*, and it be found sealed the 29th of *January*, and the Plaintiff be found ejected the 30th, this is well enough: as long as it appears that the Plaintiff was ejected after the Lease made: otherwise it is if the Ejectment had been laid the 28th.

" It is worthy of observation, that a Lease, from
 " the Day of the Date, was very lately supposed to be
 " so exclusive of the Day as to be bad whenever it was
 " necef-

* From the Date, and from each to be variable according to the Day of the Date, seem in the Subject Matter, so as at one reality to have one import: and time to denote exclusively, at another

" necessary that a Lease should commence in possession :
" though it was allowed this strict and harsh Construction was originally founded in no sufficient reason.
" But it was thought the Authorities were positive and conclusive. However, on farther Investigation, the Authorities were not found so direct and cogent as they had been apprehended ; and it now rests on the Nature of the Instrument, and the intent of the Parties, to give this expression an *inclusive* sense, or " to construe it *exclusively*."

Vide *Dowg. Contr. El.*
Vol. I.
Introd. p. 29—
31.

* *Pugb w. D. of
Leeds.*
Cwmp. 714.
Mic. 28 G. III.

Having thus considered the Dates, we " treat farther of " the Commencement of Leases.

Lease of one Commencement cannot be proved by Lease of another : but where a Man alleges a Lease to answer some special purpose, and the Jury find a Lease of another Commencement, yet if the Lease be sufficient to answer that purpose, he shall prevail.

As if in Replevin the Defendant avows for taking Plaintiff's Beast in his Common *Damage feasant* ; Plaintiff replies, that *T. S.* was seised of an House and Lands, to which he had Common, and demised the

Hob. 73.

other inclusive of the Day. Generally, time, is manifestly open to either
rally, from the Day, or from the Acceptation—

"ΕΞ ΌΥ δη τα περια διαστήντιν ιγνοῦσθαι

EX ILLO fluere ac retro sublapsa referri
Spes Danaūm—

Where it is exclusive :

*Hec adeo EX ILLO mibi jam speranda fuerunt
TEMPORE ; cum ferro cælestia corpora demens
Appetii, et Veneris violavi vñnere dextram—*

Inclusive : for in the instant of committing the Offence, the consequences are justly to be apprehended. And there is no solid

Ground of contending, that from the Day of the Date substantially differs so as to exclude the Day.

same

same to the Plaintiff the 30th of *March*: the Avowant traverses the Demise in manner and "form as by "the Plaintiff set forth;" and the Jury find a Lease the 25th of *March*: this is well enough; and Judgement shall be for the Plaintiff; for they find enough upon the whole Matter to assert the Plaintiff's Right of Common: so that their Verdict, though different from what is alleged, yet is sufficient to justify the Plaintiff's Right of Common: for though they do not find the Allegation itself, yet they find what will answer the purpose of the Allegation: and that sufficeth. But if they had found a Lease by *T. N.* they had not found enough to answer the Intent of the Allegation, nor to direct the Judgement: for the Defendant admits by his Rejoinder that *T. S.* was seised of an House and Lands, and had Right of Common; in as much as he only denies the Demise to the Plaintiff: but possibly had the Plaintiff alleged seisin of such a House and Land in *T. N.* to which Common was appendant, the Defendant would have traversed the seisin of *T. N.* or the Appendancy of the Common; so that the finding of the Lease of *T. N.* would not on the whole Matter answer the Plaintiff's purpose; because the Defendant doth not admit the seisin of *T. N.* nor the Appendancy of the Common to his House; so that upon such a finding of the Jury, the Court would not adjudge the Plaintiff's Beasts to be returned.

Pl. Comm. 14.

If a Man declare of a *parol* Lease, and give in Evidence a Lease by *Indenture*, this will not maintain the Declaration: for all Contracts that are executed with solemnity, ought first to be offered to the Court, who are the proper Judges of all things that belong to the effect of such Contract, before they can be given in Evidence to the Jury to judge of the Fact, whether such a Contract was really executed.

V. *supra.*

" Yet where *defective* as an *Indenture*, it may be good
" Evidence of a *parol* Agreement.

In

In Ejectment a Man declares on a Lease for one hundred Acres, and gives in Evidence an Ejectment out of forty Acres: this was held to be good for the forty Acres, because the Jury find an Injury relating to the same Land abutted and bounded as in the Declaration, though the Land be not of the same Extent as is there alleged; and it appears that it is the same Land, thus butted and bounded, that was let to the Plaintiff, and the Defendant did him an Injury by his Ejectment.

Cro. Eliz. 13.
Yelv. 166.
Ow. 133.
Brownl. 145.

But if the Land, or Number of Acres, be mistaken in the Declaration, some have said that this is fatal, and the Lease of other Lands for another Number of Acres cannot be given in Evidence to support it; because hereby the Contract alleged would be materially different from the Contract proved, which our Law doth not allow.

Heath's Max.
Pleading, 8.

“ And it seemeth to be true, that a different Quantity cannot be given in Evidence: unless where the Land is otherwise sufficiently ascertained in the Declaration, as being set forth by *Metes and Bounds*.

“ And therefore, if generally” a Man declare of a Lease of 26 Acres, and he gives in Evidence, and the Jury find a Lease of 20 Acres, this will not maintain the Declaration: for if the Number of Acres are not the same, it is not in substance the same with the Lease alleged; and therefore the Party hath failed in his Allegation.

Dy. 32.

But the “ uncertainty may be cured by the Admission of the Defendant: and therefore,” if a Man declares on a Lease for twenty-six Acres, and the Defendant says that he let these twenty-six Acres of Land and four more, and concludes with a Traverse, *absque hoc*, that he let twenty-six Acres of Land only, and

Dy. 32.
2 Sid. 406.
Saund. 209.
Co. 30. b.
Hob. 53, 80.

the

the Jury find twenty Acres; this by the better Opinion is found for the Plaintiff: for the Jury are only to try the Matter of Debate, and not any Point in which the parties are agreed; now they both agree that there were twenty-six Acres demised, and consequently when they find there were but twenty, they find for the Plaintiff: "for they find within the Quantity admitted by the Defendant."

Pl. Comm. 85,
6.

If a Man declares for a Messuage, and eleven Acres of Land thereunto appertaining, though the Words *thereunto appertaining* be void, in as much as Lands cannot appertain to a Messuage; yet since in common speech the Lands let with a Messuage are said to appertain to it, it is Matter of Evidence to prove what eleven Acres be intended.

If a Man has two Manors, called *Dale*, and levies a Fine of them, he may prove by circumstances which of the Manors he intended.

Hard. 33c.

If a Man declares of a Lease of so many Acres of Meadow and so many Acres of Pasture, and gives in Evidence a *Demise* of the *Herbage* and *Pannage* of so many Acres, this will not maintain the Issue: for the Contract which he alleges is for the whole Profits of the soil: and therefore the "Action" ought to be brought for so many Acres of Herbage: for which an Ejectment lies: for when a Man has the whole Estate, and lets part of it, the Lessee must declare upon that Contract as it is, and not of another.

Cro. Car. 362.
1 Inst. 4.

But if a Man hath the Inheritance in the *Grafs*, or in *prima Tonsura*, and lets this to another for Years, and

and the Lease imports a Lease of the Lands, the Lessee may declare upon this Lease, and give this Title of his Lessor in Evidence: for he that hath the *first Gras*, hath the most signal Profits, and therefore he is reputed to have the Freehold; and he that hath the *After-gras*, hath only a Profit à prendre out of these Lands in the Nature of a Common: and therefore when he that hath the first Gras, lets the Lands by the Name of the first Crop of the Lands, he hath done according to his Power, in as much as he had the very property of the Lands themselves; and then his Lessee must declare according to the very Property which is on the Lease of the Lands themselves: but where any Person has the Lands, and lets the *Herbage*, there the Lessee must declare according to his Contract; otherwise he will fail in his Proof.

If a Man declares of a Lease generally, and gives in Evidence a Lease made by a *Copyholder*, or by the Guardian to an Infant, this is well enough: for such Lease is good against every Person but him that hath *Right*, as all other Possession is: so the Lease is maintainable against every person but the Lord or Infant.

Cro. El. 676.
Hardr. 330.

“ And upon like Principles, where EJECTMENT
“ was brought by *A.* the surrenderee of a *Copybold*, who
“ laid his Demise April, 1786, and proved his Admit-
“ tance, July 1786, on a *surrender* by the Defendant *B.*
“ by way of Mortgage prior to the Demise: on the
“ Opinion of the Judge at the Assizes the Plaintiff was
“ nonsuited, and it was moved to set aside the *Nonsuit*:
“ ASHHURST Justice delivered the opinion of the Court,

Holdfast on
Dem. of Wol-
lams v. Clap-
ham.
Hil. 21 G. III.
T. R. 600.

H h

“ that

" that Ejectment being a fictitious Action to try a Title, and the Title of the surrenderee being perfect after Admittance, as from the time of the surrender, the Plaintiff was well entitled to this Action. There was another point in this Case which will come under a subsequent head.

Doe on Demise
of Barry v. Mil-
ler et al. Exe-
cutors of Cham-
bers.

T. R. 393.
Mic. 27 G. III.

" On Ejectment brought by the Treasurer and An-
" cients of New Inn to recover a set of Chambers in
" the Inn.

" It appeared that A. being Tenant for Life in the
" Chambers agreed with B. for the sale of his Life
" Estate: but the Licence of the Society being ne-
" cessary, he obtained this, and A. executed a sur-
" render to B. accordingly, who immediately entered
" into possession, and so continued till his death, which
" happened about a Month after. There having been
" no Meeting between the surrender and the Death of
" B. the surrenderee, he had never been admitted. On
" these Facts the Jury found a Verdict for the Lessors
" of the Plaintiff against the Executors of the sur-
" renderee.

" The Court was of opinion, that at all Events
" this Ejectment was well supported. For if the sur-
" render were bad for default of Admission (though
" they were of opinion that it was not like a Copyhold,
" but the whole Interest passed by the surrender,) still
" in that Case the Plaintiffs must recover, as on that
" supposition no Estate passed; and if the surrender
" were good, then a Life Interest only being conveyed,
" the Executors could have no Colour to hold against
" the Society; to whom it returned on the Death of the
" Surrenderee, who took as Lessee for Life only."

*Par. 3.***Of ENTRY and OUSTER.**

"We have said that" formerly there used to be an *actual Entry* and *Ouster*, "and that" now by Rule of Court they *confess* Entry and Ouster, and insist on nothing but the *Title*.

But the *Confession* of Entry doth not extend to such Cases where it is necessary to *prove* an Entry to make a Title in the Lessor of the Plaintiff: for the Rule is, to confess Entry of the *Lessee*, and not of the *Lessor*; and the Rule is intended to try more conveniently the Title of the Lessor; and not to *make* any part of his Title.

Hil. Att. 1700,
per Treby.
Ven. 42, 248,
332.
Salk 259.
Saund. 319.

And therefore where an Entry is necessary to take advantage of a *Condition broken*, or to avoid a *Fine*, there the Lessor must make an *actual Entry*.

Plaintiff makes Title by Lease of Five Thousand Years sealed and delivered at *London*: and the Defendant insisted on the Proof of *Entry* by Virtue of that Lease; but the Court *presumed* an Entry, unless the contrary was shewn on the other side.

"Yet it may be thought" incumbent on the Plaintiff to prove "an Entry, since he must prove" whatever is necessary to his Title; and the having a Lease seems to be no "sufficient" Presumption that the Party entered by Force of that Lease.

"The Rule appears to be thus: on *Modern Leafes* "the *Entry* is to be proved as well as the *Lease*; but

Entry on Part: where good, and where otherwise.

" in ancient ones, the Lease presumes the Entry to have
 " been under it till the contrary be proved.

Str. 550.

" On Grounds which have already been discussed, it
 " hath been held, that" if a Man make a Lease to
 begin from the Day of the Date, he cannot prove his
 Entry on the Day when the Lease was made; for that
 were a Disseizin, in as much as the Day itself is not
 included.

ENTRY on Part: where good, and where otherwise.

Co. Litt. 15, b.

If a Man makes a general *Entry* into part, this is
 ordinarily sufficient to divest the whole Estate: as if
 an Ancestor die, and the Estate descend to the Heir,
 the Entry into part is sufficient to vest the whole Estate,
 though he doth not say he entered in the Name of the
 whole: for the Presumption is always in favour of the
 Possessor, until the contrary can appear.

Now the Ancestor dying, the Possession is cast upon
 the Heir, to preserve a Tenant to the *Præcipe*: and
 since he is by Law reputed the Possessor, his general
 Act of Entry, without more saying, must be taken,
 in favour of Possession, as an Act with Intention to
 possess the whole: this is, *prima facie*, the Construc-
 tion of that Act, unless the contrary appear; that is,
 unless by any Words he makes it a special Entry, (as
 if he says, he enters into that Acre only,) for the Act
 is to be interpreted according to the Mind of the Party
 from whom it proceeds.

But

But where a Man enters to *defeat* an Estate, there Co. Litt. 15, b.
his Entry must be *special*: for he must enter into some
one Acre in the Name of the *whole*: and this is upon
the same reason; for the *Presumption* is still in favour
of the *Possessor*, unless the contrary shall appear: for
if a Man enters generally into one Acre, without say-
ing in the Name of the rest, he shall not be *presumed*
to defeat more than that into which he entered: for
since his Adversary is *possessed* of the rest, the Law
will not intend the Claim of the Possession any farther
than the Words of him that made it. *

But if by express Words he shewed an Intention to
claim the whole, and set up a Right to it, then can-
not a naked *Possession* withstand that Claim which ap-
pears plainly to destroy it.

If a Man enters to another purpose: as to deliver
a Lease upon the Lands, this is no Entry to defeat the
Possession of the Disseizor: for a Man's Intention is
to be regarded, and that gives the signification and
value to the Action, and without an Intent appearing
to defeat the Possession, this is as no Entry at all.

Co. Litt. 49, b.
Plowd. 92, 3.

* *Quod Jure quis agat, id plenissimo Juri Beneficio egisse præsumitur.*

Possessio non ultra contestata præsumitur, nisi Animo ejus contestanda quatenus Res acta appareat: pro

Possessione enim præsumitur semper.

Præsumptio LEGIS nullā Probatōne excluditur;

Præsumptioni autem Facti stabitur donec probetur in contrarium.

ENTRY, where several required.

Where the seisin is the same, there one Entry only, in the Name of the whole, sufficeth: for by the Act of Entry it plainly appears (in the Country, for whom those solemn Acts were provided) that the Party intended to defeat the whole Possession.

If a Man disseises another of one Acre, and at another time of another, the party that hath a Right may enter into one in the Name of the whole: for the Possession is the same, and there is the same person to defend it.

But where the seisin is *different*, there the Entry must be distinct in both Acres, and he cannot enter into one in the Name of both: for be my Intention what it will, what defeats one Man's Estate will never defeat another's: for no Man's Possession can be defeated by an Act which doth not relate to the Possession; and where the Possession and Seisin are distinct, the Act which defeats another Man's Seisin has no Relation to mine, for I am not concerned to know or defend it.

Ibid.
Latch. 71.
Palm. 402.

Therefore if a Man disseises another of two Acres of Land, and makes a Lease for Life of one Acre, and the like of the other, the *Disseizee* must make different Entries; because "the" two Tenants for Life have two distinct Seisins of their Estates for Life, which both are distinctly to defend.

But if he had let it to two Persons for Years, the Possession of the Tenant for Years is the Possession of the Disseisor: and they are only as his Bailiffs to keep Possession

Possession for him, and upon him rests the Defence of the entire Possession: and therefore the Law reckons one Entry in the Name of them both to be sufficient, because the Possession and Seisin of the Freehold is united in the *Disseisir*.

If there be a Disseisin of two Acres in two different Counties at the same time, there must be distinct Entries: for the solemnity of Entry is required for the sake of the County, that they may know in whom the Possession resides: and besides, as all Counties met in distinct Bodies in their proper County Courts, where the Estate was in different Counties, the Entry for their Notice was ordained to be several.

If a Man make several Conditions annexed to several Feoffments of two several Acres of Land, and both Conditions are broken, he must make several Entries into each Acre, and cannot enter into one in the Name of both: because the Ceremony of Livery was distinct by which Notice was given that Possession did begin in the Feoffee; and the Force of that Ceremony continues till defeated by an Act of the same Notoriety: "now" the defeating of one Ceremony quite distinct from the other can be no Notice that the other also is destroyed and defeated; and therefore the Entry must be different.

Co. Litt. 252. b.

ENTRY, where unnecessary.

Trin. Aff. 1700.
per Nevil.

If *J. S.* is a Trustee of a Lease for *J. N.* and is dispossessed, and a stranger enters in the Name and by the Direction of *J. N.* this is no Entry of *J. S.* the Trustee, because not made in the Name nor by the Direction of him who had the legal Estate; and an Entry that defeats Possession is to be taken according to the stricter Letter of the Law; and by the Common Law *J. N.* had not the Right of the Term, but *J. S.* only.

Co. Litt. 274, 5.
Plowd. 133, b.

If a Thing begin *without solemnity*, it may be defeated *without Entry*: for it requires no more Notoriety to defeat the Possession than it did to begin it: and therefore if a Lease for Years, upon Non-payment of the Rent, were to be void, the Estate is in the Lessor without Entry, because it began without solemnity *en Paſs*: but if a Lease for Life, upon Non-payment of Rent, were to be void, yet it cannot be avoided without Entry; because, "being an Estate of *Freehold*," it began with *Livery*: but if the Condition of a Lease for Years were, that upon Non-payment of Rent the Lessor should re-enter, "then" by the express Words of the Contract there must be an Entry.

Str. 1128.
L. N. P. 102.

If *A.* enter on the Premises "in *B.*'s Name, but "without any Authority or Command from *B.*; but "afterwards, and before the Time when the *Demise* "is laid, *B.* consents to *A.*'s *Entry*, such subsequent "Consent is sufficient. *

* *Ratihabitio retro trahitur et Mandato equiparatur.*

What shall be considered as an ENTRY.

“ A Fine, having been levied, the Lessor of the Skinn. 412.
“ Plaintiff proved that at the Gate of the House in
“ Question he said he was Heir of the House and
“ Land, and forbade him to pay more Rent to the
“ Defendant: but he did not enter *into* the House
“ when he made the Demand: on which it was agreed
“ that the Claim at the Gate was not sufficient. Then
“ it was proved that there was a Court before the
“ House, which belonged to it, and that though the
“ Claim was *at* the Gate, it was *on* the Land, and not
“ in the street; and that was holden good without
“ Question.

“ In the tumultuous times of our Ancestors, when
“ private Arms were perpetually imposing silence on
“ the public Law, after monarchal Force, and then
“ aristocratic, had violated the peaceful Equality of
“ our ancient Saxon Government, rules were established
“ necessary at that season, where *Claim* in sight of the
“ Land should be allowed in place of an *actual Entry*
“ prohibited by Force and Terror of Death. These
“ continued in occasional practice: till about the time
“ of the Reformation they gradually fell into Disuse,
“ and are now *theoretically* existent.”

TITLE IV.

*General Observations on the TITLE of the LESSOR of
the Plaintiff.*

To treat now of some particulars respecting the Title of the *Lessor* of the Plaintiff.

And here we shall not speak of *all* the Controversies relating to Title; for that were an endless and confused Work, and would draw in all the Doctrine of the Tenure under this Head: but here shall be only

men.

TITLE of LESSOR.

mentioned the *less* Particularities of Title that generally escape the other Places : and "are" therefore fit to be reduced hither by themselves.

If a Man issues an *Ejectment*, and brings an *Ejectment* to try his Title, he must shew his *Ejectment* filed : for that Remedy is founded on the *Choice* of the *Lands* rather than of the *Body* of the Debtor ; and his Choice therefore must appear of *Record*, since from that Choice he derives this sort of Execution.

If Lessee, after Commencement of his Lease, make a Lease to another, or assign it over, the second Lessee must prove the *Possession* of the first Lessee : otherwise he will fail in his Issue : for without Possession the first Lease was a *Chose in Action* not transferable over : and the Reason of the Rule why a *Chose in Action* was not transferable was from Danger of *Maintenance* of great Lords ; which was a very political Law, while the Tenures continued in a perpetual subordination one under the other.

If the Trustee of a Lease be Lessor in *Ejectment*, his Disclaimer *en Païs* will avoid the Plaintiff's Title ; for no Man can have Right against his own disclaiming of Right : and the only Remedy that *cestui que trust* has is by Bill in Equity* to punish the corrupt Conscience of the Party who disclaimed a Right to the Land when he had taken the Trust and Charge of it upon him:

* *Vi. Mansell v. Mansell.*
2 P.W. 612--4.

" It seems to have been held that a" Parson in *Ejectment* must prove Admission, Institution, and Induction, his subscribing the Articles, and declaring a full and free Assent to the Common Prayer,

For the Plaintiff must make out a good Title to himself: and therefore he must not only prove that it was well filled at first, but that it continued full till the time of the Action brought: for he must deduce his Right down to the time of bringing the Action; and by the Statute, unless he subscribe the Articles, and declare his Assent, the Living becomes *ipso facto* void without any sentence declaratory; so that, unless he proves the doing of the thing required, he doth not prove the Living full at the time of the Action, and so makes no Title at all to himself.

But "it was even then clear that" after ten or twenty Years Possession the Clergy shall not be put to the precise Proof of these subscriptions: for the long Possession is a Presumption, unless the contrary be proved; and all things must be supposed to be well done, unless within some reasonable time called in Question.

" And now it is settled that a Parson need not prove " his reading the *Articles*, nor his subscribing the *De-*
" *claration*, &c. however recent his Title, in the first
" instance: for that the Presumption always is that
" every Man conforms to the Law till something ap-
" pears to shake it."

Powel v. Mil-
bank.
2 Bl. R. 851.
Mic. 13 G. III.
C. P.

But if the Parson shews Admission, Institution, and Induction, he need not shew any Right in his *Patron* on the *Ejectment*: for if he fill the Church, he hath a Title to the Glebe and Revenues against all men: and the Right of the Patron must be contended against the Patron himself in a *Quare impedit*; or, if the time be elapsed, in a Writ of Right of an Advowson.

2 Sid. 221.

A Man

Particular Points of Evidence occurring in EJECTMENT.

Vaugh. 196--8.
Latch. 62.
Sid. 91.
Keb. 368.
Hob. 58.

A Man may make a Lease of *Tythes* to try his Title in *Ejectment*: but if a Man bring an *Ejectment* of the *Rectory*, and give the taking of the Tythes in *Evidence*, this will not maintain the Declaration: for this is no *Ejectment* out of the *Rectory*; for the Tythe is an incorporeal Inheritance collateral to the *Rectory*, and no Parcel of it; for the *Rectory* is the Church and Glebe, "of" which the Parson by his Induction is seized; and therefore they must prove an Entry into the Glebe in this *Ejectment*; for it continues a *Rectory*, though the Parson had aliened all his Tythes during his Life.

L. N. P. 102.
Ld. Cullen v.
Rich.
Mic. 14 G. II.
K. B.

"In *Ejectment* for *Mines* Evidence of being Lord of the Manor is not sufficient, for it is necessary to shew an actual Possession of the Hereditament in Question; for the same reason a Verdict in *Trover* for Lead dug out of a Mine is no Evidence.'

L.N.P. 111--4.

"*Legitimacy* frequently comes under Proof in this Issue of *Ejectment*: and it is therefore proper to recollect what hath been before noticed concerning *Declarations of Parents*.

Doe on Demise
of Freeland v.
Burt.
T. R. 701.
E. 27 G. III.

"On *Ejectment* for a *Cellar* and Wine Vaults in *Westminster*, the Defendant claimed under a Lease from the Lessor of the Plaintiff of certain Parts of a Messuage, situated on the West Side of *Swallow-street*, described to be one room on the ground floor, a cellar thereunder, and a vault contiguous, and three rooms together with the ground of the same, and

" and together with a piece of ground on the North
" side, describing it.

" It was admitted that the *Cellar* and *Vault* in question was under this last described piece of ground.

" The Defendant rested his Title on this legal ground, that he who hath the soil hath the property up to the Sky above and down to the Centre of the Earth; but the Lessor of the Plaintiff offered Evidence to shew that at the time of the Lease, the *Cellar* in question was in the occupation of another Tenant, and that therefore it could not be the intention of the parties that it should pass by the Lease to the Defendant. The Counsel for the Defendant contended that the Plaintiff was estopped by his Deed from saying that the *Cellar* did not pass. Buller Justice thought the Evidence admissible: the Plaintiff had a Verdict accordingly; with liberty to the Defendant to enter a *Nonsuit*, if the Objection were well founded.

" And the Court was of opinion, that, considering the Nature of this property, and the circumstances of the Case, Evidence was rightly admitted to shew the state of the premises at the time of the Lease, and thus to rebut the *prima facie* presumption: and that parcel or not parcel of premises demised was properly matter of Evidence.

" The

* *Cujus est solum ejus est supra usque ad Cælum et infra usque ad inferos.*

Whether PARCEL of the DEMISE or not is Matter of
EVIDENCE.

Doe on the Demise of Ellis v.
Sandham. T.R. 703.
E. 27 G. III.

“ The Lessor of the Plaintiff brought an Action of *Ejectment* to try the Validity of a *Lease* under a Power to demise for 21 years, in possession, with the customary restrictions, and so that every such Lease should contain USUAL and REASONABLE COVENANTS. In the Lease, which was brought in question, was a *Covenant*, that if the buildings, or any part thereof, should be blown down, or burnt by lightning or accidental fire, the Lessor, or the person who should then be in possession of the freehold and inheritance, should rebuild, or in default thereof, the Lessee should be at liberty to quit the premises, and be forthwith discharged from the payment of the yearly rent.

“ The Jury found this to be an unusual and un-
“ bearded Covenant on the part of the Lessor: and
“ the COURT was accordingly of opinion that the
“ Lease, by reason of this Covenant, was, in its Cre-
“ ation, VOID.

V. Doe on De-
mises of Brif-
towe v. Pegge.
T. R. n. 758.

In *Ejectment* the Defendant shall not give in Evidence a former Mortgage or Conveyance made by himself: because he cannot take advantage of one Contract that he has made, thereby to destroy another.

T. R. n. 759.
Et supra, T. R.
601.

Ibid.

“ In like manner a *Trust* shall not be set up against a party for whose benefit it was intended.

“ Nor farther, shall a *Tenant* under a *Lease*, whose possession is not meant to be disturbed, and who has notice accordingly, set up his *Lease* as a Bar to a Recovery in *Ejectment*.

“ Neither

" Neither shall a *Mortgagor* disclaim Title in pre- ^{Ibid.}
" judice of his *Mortgagee*, by setting up a superior
" Title in a third person, though not derived from
" the *Mortgagor*: any more than a *Tenant* who has
" paid Rent, or otherwise acted as *Tenant*, shall set up
" a superior Title in a third person in bar of an *Eject-
ment* brought by his *Lessor*.

TITLE V.

Of what an *Ejectment* will not lie.

" An *Ejectment* being a possessory Action will not ^{L. N. P. 99.}
" lie for Things whereof the Sheriff cannot deliver
" possession.

" Whatever creates a *Discontinuance* is a Bar to an ^{Co. L. 527.}
" *Ejectment*.

" Ejectment will not lie of an uncertain Quantity
" or uncertain Species of Land: as of twenty Acres
" arable and pasture without distinguishing; or, of
" twenty Acres, more or less.

" Yet an *Ejectment* for a Messuage and Tenement
" has been held sufficient so as not to be defeated by a
" Motion in Arrest of Judgement.

L. N. P. 109.
Salk. 254.
11 Co. 55.
Holdfast and
Wright.
M. 12 G. I.
C. B.
Savil's Case.
11 Co.
Doe on Demise
of Stewart v.
Denton.
M. 26 G. HI.
T. R. 11.

CHAPTER III.

" In the two preceding *Issues* the Evidence applies
" to the *Title*, or to the *Possession*; in the two *subse-
quent*, to *Acts injurious to the Right*: though in the
" one, the *Title* be admitted, and in the other the
" general *Possession* be not denied.

" Of this we shall begin with **WASTE**, since in its
" extreme sense it is nearest to the two preceding In-
" juries, as it may render the possession of no Value.

TIT.

TITLE II.

Of WASTE.

Comm. II.
Ch. 18, p. 281.

" WASTE is the wilful or negligent damaging of corporeal hereditaments, to the prejudice of him that holds the remainder or reversion.

" It may be committed not only by destruction of buildings, or damage done to the house itself, but by removing or damaging what is permanently attached to the freehold.

" It may be committed not only by cutting down of Timber, but by doing any thing without lawful Authority, which prejudices their Value or impairs their growth.

" It is an offence incurred by unreasonable destruction in ponds, dove-cots, warrens, whereby a sufficient number is not left to attend the inheritance.

" It may (though perhaps an improved state of Agriculture diminishes the probability of this complaint, and might soften the rigour of the construction) be committed by changing arable into pasture; or conversely: as not only changing the course of husbandry but affecting the Evidence: which reasoning has been extended to an alteration of an Edifice, even though improved in Value; so to open the Land in search of Mines: though otherwise of digging for Mines already opened.

2

" By

Hob. 296.
1 Inst. 53.

¹ Lev. 309.
⁵ Rep. 12.

"By the Statute of Gloucester, the Plaintiff in an L.N.P. 119
Action of *Waste* is to recover the Thing wasted, and
treble Damages."

If a Man brings an Action of *WASTE* upon the general *Issue* of *Nullum fecit vastum*, the Defendant cannot give in Evidence that the Houses were repaired, and the Waste set right before the Action brought: for this *confesses* the *Waste*, and *avoids* the Action, by shewing that it is not lawful for the Plaintiff to bring his Action where the Injury is *already* redressed: and on the general *Issue* the Plaintiff denies "originally" any Cause of Action.

5 Co. 119.
2 R. Abr. 682.
2 Sid. 229.
Mod. 94.
Lev. 309—12.
2 Saund. 252—
9.
3 Keb. 8.
L.N.P. 120.

So upon this *Issue* the Defendant cannot give in Evi- 12 H.VIII. 1.b.
dence a *Licence* to cut down Trees: for this is to *con-*
fess, and not to deny the doing of the *Waste*.

"So," if the Defendant cut Timber and lay it out in *Repairs*, he cannot give that in *Evidence* on the general *Issue*: for this Evidence "too" confesses and avoids the Declaration: it admits the *Fact*, but brings those circumstances in which shew the Fact may be lawfully done: and these for Reasons "before explained" ought to be offered to the Court: and "therefore all these Matters, in so far as they may "justify," he ought to plead *specially*.

12 H.VIII. 1.a.
Doct. Pl. 199.
Co. Litt. 283.
2 Inst. 145.

But the Defendant, "upon the general *Issue*" may give in Evidence "any thing that proves it *not waste*:

11 H.VIII. 1.a.
Co. Litt. 283.a.
W. Jones, 240.

V. supra.

“as,” that his House was *ruinous* at the time of the Lease made: that it fell by the Wind or by Tempest: because this Destruction arises, in the first Case, by the *Act of the Plaintiff*, and in the last by the *Act of GOD*; and therefore it was *no Waste* at all: and when the Defendant proves there is *no Waste*, he falsifies the Declaration; which is proper for the general Issue.

So “at Common Law” the Defendant “might have” given in Evidence that the House was *burnt by Accident*, “without Negligence of the Defendant:” for this *Act of GOD* is *no Waste*; “where” it cannot be supposed within the Party’s power to prevent.

6 A. c. 31.

“But now by Statute a Tenant is not liable to an Action of *Waste*, in case the House which he occupies be destroyed by Fire, through his Negligence.

“It will not be a Defence that a *stranger* did the Waste: for the Defendant may recover over against the stranger.

“For *extremely petit** Damages the Plaintiff shall not recover: otherwise an inlet would be opened to exceedingly vexatious suits.

“In what has lately been said, some difficulties may at first present themselves to the Student: and as

* It is in this meaning that, *De minimis non curat Lex.*

" the Explanation of the point which may occasion
" them, illustrates a leading Principle of Law very
" extensive in Practice, this will be a proper oppor-
" tunity of enabling him to satisfy himself.

" He may think the Reason not clear, or the Boun-
" daries not readily ascertainable, in those instances
" where we have said the Defendant cannot plead
" generally, compared with those where we have stated
" that he may. He may suppose that in the instance
" of cutting the Timber for Repairs, or by *Licence*
" from the Landlord," the Evidence falsifies the De-
claration: inasmuch as it proves that the cutting of
the Timber is not to the Disherson of the Lessor;
and so it may be given in Evidence on the *general*
Issue.

" But the Answer is this :" if you admit any Fact,
you allow all the Consequences of that Fact: now
when the Defendant's own Evidence does attest the
cutting of the Trees, he must allow the consequences
of that Fact when it is to the Lessor's Disinheritance:
for on the Issue nothing but the Truth of the Fact in
the Declaration can be called in Question; you can-
not therefore on this Issue allow the Truth of the
Fact, and yet offer it to the Jury, denying all the Con-
sequences of Law attendant upon the Fact: for that
is improper for the Jury, who are not Judges of the
Law, and therefore must be offered to the Court,
who are.

“ Now where the Defence results from the general Nature of the Facts, it may be given in Evidence on the general Issue; but where the Fact in itself would fall within the charge of the Declaration, and is exempted from it by particular circumstances, there, in *civil Cases*, it must be pleaded *separately*; but in *criminal*, the Defendant shall avail himself of whatever makes for his Justification, by giving it in Evidence under the general Issue.

Par. 2.

Distinction between WASTE and DESTRUCTION.

“ In *Equity* there has been a Distinction for a considerable time established between WASTE and DESTRUCTION.

V. Cases cited
in Pyne v. Dor.
T. R. 56, ut
infra.
V. Charleton
v. Charleton.
3 Atk. 216.
v. etiam.
3 Atk. 215.
5 Bac. Abr.
491.

“ And thus where A. on the Marriage of his eldest son, in Consideration of 10,000*l.* Portion, settled *Raby Castle* on himself for Life, without Impeachment of *Waste*; Remainder on his son for Life; Remainder to the first and other sons in Tail; and after, on Displeasure against his son, suddenly set to work 200 Men, who stripped the Castle of the Lead, Iron, Glass, Doors, and Boards, to the Value of 3000*l.* the son filed a Bill; and the Court granted an Injunction: not only to stay *Waste*: but with a Decree to repair the Damage done: and a Commission issued accordingly.

“ They afterwards applied this Protection to an Avenue leading to an House: and then to Trees, not composing an Avenue, but which contributed to the ornament and shelter of the House: and the Courts of Law will apply the Principle of this Distinction where Cases that are within it come before them.

“ If

Where CASE only shall be brought.—TRESPASS,—
Clausum fregit.

485

Par. 3.

Where CASE only lies.

" If a Lease be made, excepting the Woods and
" Timber, Waste will not lie against the Lessee for cut-
" ting them down: but an Action on the Case will.
" And so if Tenant at Will cut down Timber: the
" Owner shall not have Waste: but he may recover a
" Compensation by Action on the Case.

L. N. P. 119.
Dy. 19 pl. 110.

CHAPTER V.

T R E S P A S S, CLAUSUM FREGIT.

" TRESPASS by breaking and entering the Close of an- Comm. III.
" other is committed where a Man entereth another's c. 12. p. 209.
" Ground without lawful Authority."

TITLE II.

On the Issue NOT GUILTY in Trespass.

We will consider what Evidence must, may, or may not be given on the part of the Plaintiff.

Secondly, what Evidence may or may not be given on the part of the Defendant.

FIRST, what Evidence may be given by the Plaintiff to prove his Declaration.

If a Man declares in *Trespass*, and assigns the Trespass in an Acre of Land, thus butted and bounded, and gives Evidence of a Trespass in half that Acre, it is sufficient: for since he proves the Damage within the Bounds alleged in the Declaration, he proves "all that is necessary in that respect:" for a Trespass in any part of the Acre is a Trespass in the Acre, and so answers the Declaration: in as much as

Cro. Ja. 313, 4.
Yelv. 114.
Noy, 125.
Brownl. 210.

in these Allegations Damages only are to be recovered, and he has sufficiently proved Damage, which ought to be redressed.

Cro. Jas. 183, 4.
Yelv. 114.

But if a Man declares in an *Ejectment* for an Acre thus bounded, and proves Title to but half, this is not sufficient, unless he distinguishes the Premises: nor can any Execution be had by Delivery of Possession of Part, unless that Part be ascertained; for one part of an Acre may be much better and more fruitful than another.

Cro. Jas. 184.

2 Str. 820.

Cro. Jas. 184.

If there be two *Tenants in common*, and one brings an Action *without* the other, the Defendant cannot take advantage of this upon the *general Issue*; but he ought to have pleaded it in *Abatement*: for when the Plaintiff proves that he had the Possession of the Soil, and that there was a violation of that Possession by the Trespass of the Defendant, he proves his Declaration; for the *manner* of having or possessing is not called in question in the Declaration; whether he had it with another, or by himself alone, it is still *Clausum ejus*; and if violated by the Defendant, the Plaintiff is to be redressed: and it is not incumbent on him to prove more than what he has alleged; that the Close or Field was his own, and that a *Trespass* was there committed by the Defendant: and this is not like the Case in *Ejectment*, where a Man declares of a sole Demise, and gives in Evidence the Demise of *Tenants in common*; for there the Plaintiff does not prove the *Title* that he has alleged in his Declaration, and so fails in his Evidence;

dence; but where one Tenant in common brings *Trespass*, he doth not bring his *Writ* in the manner the Law requires, for since each hath an undivided property in gross, both should have brought their Action of *Trespass* for the Damage to it; and if the Writ be not brought in the manner the Law requires it, the Defendant may plead it in *Abatement*.

But if there be two *Tenants in common*, and *one* brings an Action against the other, they may take advantage of this on the *general Issue*. As in *Trespass*, and *Not guilty* pleaded:—the Defendant gives in Evidence that *Bromley* was seized in Fee, and let the Premises to the Plaintiff and one *A.* who assigned the same to *B.* by whose Commandment the Defendant entered: and this was allowed to be *good Evidence* for the Defendant on the *general Issue*: for this disproves the Fact alleged in the Declaration; for by this it appears he did not violate the property of the Plaintiff; he did not enter into a Close that was *bis* alone, but his *own* Close.

2 Leo. 83, 94.

If a Man declares of *Trespass* in a certain Place, abutting on a certain *Mill*, in the Tenure of *J. S.* if "he" does not prove his *Abutments*, he is gone: and because he could not prove that the Mill was in the Tenure of *J. S.* the Jury, being at Bar, was discharged; for he fails in his Proof, because he doth not prove it to be the Close distinguished and described in the Declaration: and so it doth not appear there was any *Trespass* in the Close he has described.

Gouldsb. 124, 5.
R. Abr. 677.
pl. 1. 2.

Par. 2.

TIME.

If a Man be said to assume the 4th of *May*, and he be then proved to be *dead*, and the party be proved to assume another Day, it sufficeth. But if a Man bring *Trespass* against another, and lay it to be done, the 4th of *May*, and the party is proved to be dead, this discharges the Action, for a *personal* Action that complains of a *Wrong* done *dies* with the Person*.

Co. Litt. 283, 2.
Cro. Car. 228,
514.
2 R. Abr. 680.
pl. 3.
2 Sid. 308.

"But where the Party continues in Life," if *Trespass* were done the 4th of *May*, and the Party allegeth the same to be done the 5th of *May* or the 1st of *May*, when *no Trespass* was done, yet if upon the Evidence the *Trespass* was done *before* the Action brought, it is sufficient: for the Time of the *Injury* is no more a material part of "an" *Injury* than it is of a *Contract*; and therefore whether there *is* an Injury done or not is the Question, and not *when* it is done: but if there was no Injury done at the *time* of the Action brought, then had the Plaintiff no Cause of Complaint; and so the Action was wholly groundless;

33 Co. 21, 2.

If a Man *recovers* in an *erroneous* Judgement, and *Trespass* be committed by a stranger on the Land, and after the Judgement is *reversed* by Error, yet in *Trespass* brought by the *Recoverer*, he shall give this whole Matter in Evidence, and maintain his Declaration: for though the Writ of Error destroys the Judge-

* *Aktio personalis Injuriarum moritur cum persona.*

ment

Par. 3.

Fixtures.

ment between the parties by Relation and Fiction of Law to advance the Right, yet that Fiction of Law shall not be set up to encourage Wrong and discharge the *Trespasser*: for the whole Profits are recovered by the Plaintiff in the Writ of Error against the Party that recovered in the Judgement; and therefore it is fit he should punish all *Trespassers*.

Par. 4.

Trespass by Servant of another.

Upon *Trespass* brought against *A.* on Evidence that the Hogs of *B.* were kept in the Defendant's Yard (adjoining to the Land of the Plaintiff) by the servant of *B.* it was allowed that this Evidence did maintain the Declaration against *A.*

So in *Trespass* against *A.* Evidence given of Agistment of Beasts taken into the Land of *A.* allowed to maintain the Declaration against *A.*

For *A.* in these Cases had a *special Property* in the Beasts: and it is by Reason of that Property the *Trespass* is committed; and therefore he is justly answerable for it: for had not the Beasts been taken into "his" Ground, they had never broken into the Ground adjoining.

Par. 5.

Fixtures.

In *Trespass* for taking down a *Pew*, the *Evidence* was that the Pew was fastened to the *Pillar* of the Church with a *Chain*; this is no good Evidence to prove

Trespass ab initio by Relation.

prove the Declaration: otherwise it is if it had been fixed to the Pillar by a *Nail*: for in the one Case it is not fixed to the Freehold; but in the other it is: for whatever is *fixed* to a Church or House is reckoned part of the Church or House in which it is fixed; for the Church is an House which consists in its Frame and Building of several distinct Materials fixed one in another; whatever therefore is fixed to the Church or House is a *part* of it; but if it be fixed to another thing that is fixed to the Church or House, it may then belong to another; for not being immediately fixed to the Frame of the House or Church, it cannot be reckoned part of it.

V. Wood's
Ins. B. II.
Ch. 6. p. 33.
L. N. P. 34.

T. R. 430.

" It is said that *Trespass* will not lie for entering a Pew; because the party has not the exclusive possession; the possession of the Church being in the *Parson*.

*Par. 6.**Trespass retrospective.*

Comm. III.
213.
Finch L. 47.
Cro. Ja. 148.
2 R. Abr. 561.
3 Rep. 147.

Oxley v. Watts.
M. 26 G. III.
T. R. 12.

21 G. II. c. 19.
Comm. 15.

T. R. 480.
2 R. Abr.
Trespass. G. 6.

" Where the *original taking* is lawful, yet by the subsequent *unlawful Use* of the thing taken, the party may become a *Trespasser ab initio*: as if a man come into an *inn*, and will not go out in reasonable time: otherwise for mere *non-feasance*, as in not paying for the Wine, for which the Landlord may have *Debt or Assumpfit* against him.

" And on this principle it was determined that *Trespass* lay against the *Bailiff* of the Lord of a *Manor* for working an *Estray*, agreeable to the old Authority in Point on this Case.

" But by Statute a *Distraitor* for Rent shall not, on account of irregularity in taking the Distress, be a *Trespasser ab initio*.

" So *Officers of Justice* doing their Duty shall not, on account of a subsequent unlawful Act, be *Trespassers by Relation*.

In

Par. 7.

Trespass with Aggravation *ex turpi Causâ*.

In TRESPASS, *Quare Clasum et Domum fregit et alia enormia ei iniulit*, upon Evidence it appeared that an Injury was offered to the Plaintiff's Daughter: and it was allowed that any Matter that arose *ex turpi Causâ* might be given in Evidence upon the general Declaration of *alia enormia ei intulit*: but "that" any other Matter, that doth not arise *ex turpi Causâ*, could not be given in Evidence on the general Declaration of *alia enormia ei intulit*, but it ought to have been expressly set forth in the Declaration, or else nothing could be given in Evidence thereunto relating: for it doth not seem to agree with Modesty to express the Manner of any indecent Commerce; but all such Things must be more properly "concealed" under general Words, and therefore may be fitly given in Evidence on the *alia enormia ei intulit*.

" Yet in reality the Chastity of the Law does not consist in the Nicety of Terms, but in plainness of Expression and Purity of Intent. It is not therefore from a Refinement of Delicacy that this *oblique* Mode of Action is introduced. The true Reason seems to be, that the Father might have a Remedy, as far as the Injury was capable of any: and it is permitted in this Form, there not being a *specific* Action adapted to his Redress. And the Rule appears rightly stated, that if the principal or specific Charge will bear an Action, you may give any thing in Evidence in Aggravation of Damages that will not bear an Action of itself."

^{2 Sid. 285.}

^{2 Keb. 787.}

^{Cro. Ja. 534.}

L.N.P. 89.

SECONDLY,

TITLE III.

SECONDLY, Evidence of *Not guilty* for the Defendant in *Trespass*.

The Defendant may prevail in this Issue,

First, by making *Title* to the *Land*;

Par. 2.

Of Interests surviving after Estates determined.

3 Co. 116.
Gouldib. 189,
90.

Secondly, by making Title to the *Profits* of the Land, when he hath no Title to the Land: for this also falsifies the Declaration; for hereby the Defendant did not beat down the Plaintiff's Corn, but entered to take his own: and if the Defendant proves the Corn to be his own, the taking of it is no Manner of Trespass to the Plaintiff; and so the Defendant hath disproved the Fact laid in the Declaration.

Now the general Rule is, that where a Man hath an *uncertain Interest*, and sows the Land, and his Estate *determines*, yet he hath a Title to the *Corn* that he hath sown on the Land, though the property of the Land is altered.

And this upon these three Reasons,

First, because it is a public Benefit that the Lands should be sown and cultivated, and all things that tend to Plenty and Encrease ought to have the uttermost security that the Law can give: hence it is fit that they should suppose a property in the Corn distinct from that in the soil, and that this property should be at the entire Disposal of the Owner, distinct and separate from the Land; that all Encouragement possible might

might be given to Tillage, and that no Man might decline Cultivation under Fear lest the Profits should be swallowed by any person that he disliked.

Par. 3.

Principles of Property and subordinate Grounds.

Secondly, when any person hath sown, he hath gained a special property in the Corn by his Labour and Industry; and therefore, though his Property in the soil changes, yet the Property of his Labour remains: and this arises from the *natural Consideration of Property*, which was at first derived from *Labour*: for a Man's own Actions, "and their Effects," are most properly his own, and from thence all Ownership begins: for the very Value of the Soil is not more ("nor "even in the most fruitful Countries in any degree so much") from the soil itself than from the Labour and Industry that men have employed in their Cultivation: which will very plainly appear by considering the Difference between that in *England* and the *West Indies*. *

LOCKE on GOVERNMENT.
B. II. Ch. V.

" And besides the Value which Tillage would of " itself give to the natural Produce of the Soil," Corn still adds a farther Value to the Land, surmounting the Value of a natural Product from cultivated soil as that doth the Product of Waste and barren Soil.

* In the ANNALS of AGRICULTURE, p. 93, Vol. VIII. a general Idea is given of the produce of free Labour in England, contrasted with that of Slave Labour in the West Indies. The Balance appears to be very great, perhaps eight or ten to one to

the disadvantage of Cultivation by Slaves. And the effect of Industry under the favorable circumstances in which its influence is exerted without the impediments of Terror and Despotism, is shown to be great indeed.

It follows that there ought to be another Property in the Corn distinct from that of the Land, in as much as there is a Labour in acquiring and sowing the Corn distinct from the Labour whereby the Land was at first occupied and gotten: also there is a distinct Charge in sowing the Corn from the Money whereby the Land was purchased. "And from all these" the Law, following Nature, doth erect a distinct Property in the Corn different from the soil.

There is "farther" a Property in the Corn distinct from the soil *before* the Corn is committed to the Earth: and that Property is not lost by sowing in a Man's own soil; "own, either absolutely or by Hire:" for I cannot lose the property of what is my own by putting it in a Place which is my own also. But if I sow my Corn, "without any Right by Contract," in another Man's Soil, it ceases to be mine: in as much as I set it in the Place of the natural Product of his soil, and therefore it must belong to the Owner as the natural Product of the soil did: and were it otherwise, men would break in upon other People's Grounds, and sow them, and keep men out from the Disposal of their own Estates, and thereby they would raise a Property to themselves from another's Estate, and put the Owner to the trouble of controverting it.

" And according to the Nature of the Seed committed to the Ground, the produce is regarded as "personal; or as *real*, and appertaining to the Inheritance.

Par. 4.

Interests survive not where Estate determined by the Act
of the Holder.

"Thus," because a Man expects a yearly return of the Corn he sows, it is reckoned part of his personal Estate, as the Corn itself was before it was sown. But otherwise of Timber Trees planted: for they must be supposed annexed to the soil, since they were planted with the Prospect that they could not come to their "full Use and Perfection" till many Generations afterwards.

If Tenant for Life sows the Land, and dies, his Executors shall have the Corn, and they may take it from off the Ground of him in Remainder: and if Trespass be brought, there is good Evidence to discharge the Defendant "on" Not guilty.

Co. Litt. 55. b.
5 Co. 116.
R. Abr. 726, 7.
2 Bull. 213.
2 Inst. 81.

So it is if Tenant at Will sows the Land, and the Lessor determines his Will.

Co. Litt. 55.
5 Co. 116.

But if Tenant at Will determine the Will by any Act of his own, he shall not have the Corn sown: for when he determines his Will, the Interest is in another, and therefore he can no more reap the Increase of his Corn than if he had sown in another Man's Ground; the Corn growing in the mean time hindering the Owner from all natural Increase: and therefore to determine the Will is to relinquish the Corn; for to leave the Land is to leave the Profits of it.

R. Abr. 727.

So if Femme Copyholder have Land *durante viduitate*, and marry, the Husband shall not have the Corn, but the Lord: because by her own Will she has determined the Estate:

Ibid. 726.
5 Co. 116. b.
Cro. Eliz. 460.
Moor 394.

But

Interest survives where the Estate is determined without Crime, or inevitably.

Par. 5.

Interest survives on Estate involuntarily determined.

2 Inst. 81.
Co. Litt. 55.
5 Co. 116.
Goldf. 189.

But if the Estate be determined by a *compulsory*, and not by a *voluntary Act*, there the Property of the Corn doth not alter and go to him that hath the Interest in the Land : for the Law is, and ought to be, so tender of every Man's property, that he shall not be reckoned to part with it without a plain *Act* of his own Will : and consequently the Person who had the property in the Corn shall not be supposed to quit it, unless he do some *Act* whereby he voluntarily determines his own Estate in the Land, and thereby parts with "the Profits."

5 Co. 116.
Goldf. 190.
Moor, 394.
R. Abr. 726.

Therefore if a *Lease* be made to Baron and Femme during the *Couverture*, and they be divorced *Causâ præcontraetus*,* yet shall the Baron have the Corn sown ; because the Marriage determines by Compulsion.

5 Co. 116.
Goldf. 190.

So if the Tenant at Will be *outlawed*, this determines the Will, because he hath forfeited all Contracts : but this being by Compulsion, the property of the Corn doth not go to the Lessor, but to the King, to whom all his Chattels are forfeited.

But

32 H. VIII.
c. 38. and
26 G. II. c. 33.
Vide Comm. 1.
c. 15.

* This seems reasonable, if the *Precontract* were by the Wife, the Husband not being privy to it ; otherwise, if by the Husband. The Law of *Precontracts*, as rendering void a subsequent Marriage, seems now reduced to certain confined and reasonable Limits by the concurrent Operation of two Statutes : the latter of which appears, as to this particular, to revive the precedent Statute ; whereby *Conjummation* was necessary to be proved in order to maintain the disability ex causâ *præcontractus* for the avoidance of a subsequent Marriage.

But if a Lease were made till the Tenant did *waste*,
and the Tenant doth *waste*, he shall not afterwards have
the Corn sown: for here he determines his Lease by a
voluntary Act of his own.

If a Man makes a Lease at Will, and the *Lessor* be
outlawed, whereby the Will is determined, yet shall
the *Lessee* have the Corn sown, and not the King: for
here was no Act of the Lessee to determine the Will,
or to alter the property.

If Tenant for Life or at Will forfeit or break a Con-
dition, they shall not have the Corn sown: for this is a
voluntary Act within their own power.

But if a Woman, who hath an Estate *during Videntiality*,
make a Lease for Years, and the Lessee sow the Land,
and then the Woman marries, yet shall the *Lessee* have
the Corn: for the Act of the Lessor, after the Lease
made, cannot alter the property of the Lessee; for a
man's property, once lawfully vested in him, cannot be
devested out of him by the Act of another.

It seems also in *Common Law*, that if *Tenant in
Dower* die, her *Executors* should have the Corn: for
the Statute of *Merton*, which gives the power to devise
it, was only made in *Affirmance* of the *Common Law*.

If a Man die, leaving Issue a Daughter, his Wife
being *privement enfilete** of a Son, and the Daughter
enters and sows the Land, and then a Son is born, she
shall have the Corn.

If the Husband sows the Land of his Wife, and the
Wife dies, he shall have the Profits.

* According to the old *Orthography* of *Law French*, for
enceinte: I say *Orthography* in the technical, not the proper, im-
port: as *Orthodoxy*, not for rea-
sonable and right Judgement ab-
solutely, but for that which is
established in a particular system
to be received as reasonable,
right, and true.

If Husband and Wife are *Joint Tenants*, and the Husband sows the Land, and dies, the Corn shall go to the Executor of the Husband: for this Land is not cultivated by a joint stock; but is wholly the Corn of the Husband; which property seems not to be lost by committing it to their joint possession any more than if it had been sown in the Land of the Wife only.

R. Abr. 727.

If a Woman, seised in Fee or for Life, sows the Land, and takes an Husband, and he dies before the severance, the Wife shall have the Profits, and not the Executors of the Husband: for the Corn committed to the Ground is a *Chattel real* that is annexed and belonging to the Freehold, and not a *Chattel personal* annexed to and transferred "with the person:" and therefore, without the Husband's Disposition of it during his Life, it belongs to the Wife, and not to the Husband.

Bract. 96.
R. Abr. 727.

If Baron sows the Land, and dies before severance, the Wife shall have the *third* part of the Land so sown for her *Dower*; for if a Man hath all Corn Land, she shall not stay for her subsistence a whole Year till the Corn be removed: and from hence it was doubted at Common Law, if the Widow sowed the Land whereof she was endowed, whether her Executors or the Heir should have the Corn sown.

If a Man seised in Fee sow Copyhold Lands, and surrender them to the Use of his Wife, and die before the severance, it seems that the Wife shall have the Corn, and not the Executors of the Husband: for this is a Disposition of the Corn; *that* being appurtenant

to the Land ; and since the Husband hath disposed of it during his Life, it cannot go to his Executors.

If Tenant by Statute Merchant sows the Ground, and after is satisfied by some *casual* profit, yet he shall have the Corn.

Co. Litt. 55.
R. Abr. 727.

If a Man sows his Ground, and dies before severance, the Corn goes to the Executors, and not to the Heir.

Hob. 132.

If *A.* seised in Fee of Land, sows it, and then conveys to *B.* for Life, the Remainder to *C.* for Life, and *B.* dies before the Corn is reaped, *C.* shall have it, and not the Executors of *B.* for *B.* had not the property of this Corn from his own Charge and Industry, but merely by the Donation of *A.*; the Corn appertaining to the Land that was given: and for the same reason, and by force of the same donation that *B.* had his Corn, *C.* is to have it after the Death of *B.*

Hob. 132.
R. Abr. 727.

But why doth the Corn pass to the *Donee*, as appertaining to the *soil*, when the property of the soil alters, and yet shall not descend to the *Heir*, as appertaining to the soil, when the property of the soil remains in the first Owner?

Every Man's *Donation* being taken most strongly against himself, shall pass not only the Land itself but the Chattels which belong to the Land: but no Chattels can descend to the Heir; they go to the Executor. Why this is accounted a Chattel, we have shewn already.

Winch. 51.

A. seised in Fee, sows the Land, and *devises* it to *B.* for Life, Remainder to *C.* *B.* shall have the Corn sown, and not the Executors of *A.* for *B.* the Devisee, in relation to the Chattels belonging to the Land, is put in the place of the Executors by the Words of the Will: but if *B.* dies before severance, *C.* shall have it.

Tenant for Life, Remainder in Fee:— Tenant for Life lets out the Land for Years; Lessee for Years is *ousted*, and Tenant for Life *diffeised*, and the Diffeizor lets the Land for Years, the Lessee of the Diffeizor sows it, and Tenant for Life dies. The Lessee of the Diffeizor shall have that Crop sown: and not the Remainderman: for the “Lessee” of the Diffeizor has Right to the Profits of the Land that he hath sown against any person but him who had Right to the Land itself: and that was the Lessee of Tenant for Life; and he should recover against the Lessee of the Diffeizor all the Profits that he made of the Lands: and therefore the Remainderman cannot recover any part of it; for then the Lessee of the Diffeizor should be doubly charged.

Hob. 132.

If *A.* seised in Fee, sows Lands, and gives it to *B.* for Life, Remainder to *C.* for Life, and they both die before severance, it shall go to *A.* for when the Force of the Donation ceases, the property returns where it was.

R. Abr. 728.
Co. Litt. 55.

If Tenant for Life sows any Grain, or Roots of annual Profit, they go to his *Executors*, and not to him in Remainder: “for the Reason already given.”

If

If he increases the natural Product, either by trenching or by sowing of hay seed, this shall go to him in Remainder: for his Executors have no Property in the natural Product; and Improvement is undistinguishable from the natural Product.

But *Hops* reared on ancient stocks shall go to the Executor of Tenant for Life, and not to the Remainderman: for the Poles, the Hills, and the Dung, whereby the Product is made, are the proper Chattels of Tenant for Life: otherwise of Garden Roots, which cannot be taken up without digging the soil of the Heir.

Cro. Car. 5th.
Co. Litt. 55.

" It seemeth that Roots, nay even *Trees* belonging " to a *Gardener*, who raises plants for sale (provided " they are removeable without destruction to their " growth) shall go to the *Executor*, and not to the Heir. " For to him, by the Nature of his Use and Interest in " them, they are *personal property*; they being his *Stock* " in *Trade*, and not raised to stand for a continuance."

Whoever hath the *property* of the *Corn* may give it in Evidence on *Not guilty*: or may maintain a *Trespass*, *quare Clasum fregit*; for to that purpose the soil is his.

Co. Litt. 46.
Dy. 285.

What must be specially pleaded.

TITLE IV.

Licence.

Upon *Not guilty* in *Trespass* the Defendant cannot give a *Licence* in Evidence: for this supposes the *Act* to be done, and *justifies* its *Lawfulness*; and all such Matters ought first to be exhibited to the Court to judge.

Bro. General
Issue, 81.

In *Trespass* on *Not guilty* the Defendant cannot give in Evidence that he came into the Plaintiff's Close to take his own Horse; but this ought to have been pleaded: and on such a Plea, that the Defendant came to take his own Horse, the *Evidence was*, that the Plaintiff, as Lady of the Manor, took the Defendant's Horse as an *Estray*, and that the Defendant took him away, after he had been cried and marked, without paying for his Meat: and it was ruled, that this taking was well enough, and the Plaintiff has an Action on the Case for his Meat: for the property of the Horse is still in the Defendant till the Year and Day are past; and when a Man hath property, it is lawful for him to take it, for the very Notion of Property is Right to possess and use the thing which he claims.

*Par. 2.**Right of Way.*

In *Trespass*, the Defendant cannot give in *Evidence* a Right to a Way; but he ought to have *pleaded* it: and if, after pleading, he shews in Evidence a Right to the Way, by *Grant* over the Plaintiff's Ground from such a Place to such a Place, though the Defendant afterwards purchases more Ground, whereby he makes a farther Use of the Way, yet it is well enough, and within the Grant: for if I go but between the same Towns, I may pass afterwards wheresoever I please.

*Senhouse v.
Christian and
others.
T. R. 560.
Hil. 27 G. III.*

“ On an Action of *Trespass*, the Declaration “ counted for *breaking the Plaintiff's Close*, called THE SLIP of LAND (describing the locality) in the County of *Cumberland*, and making two framed Waggon Ways “ for

" for Coals; one in a straight direction through the
" said Close, the other in a transverse direction.

" The Defendant pleaded, first, the General Issue:

" Secondly, (except as to the Way in the transverse
" direction,) a Grant from one Humphrey Senhouse by
" Indenture between him and John Christian deceased,
" grandfather of the Defendant, to the said John,
" his Heirs and Assigns, of a free and convenient
" WAY, as well an borse-way as a foot-way, as also
" for carts, wains, and other carriages whatsoever, in,
" through, over, and along THE SLIP OF LAND
" leading from A. to B. (describing the longitudinal
" Extent) with full and free liberty to carry on borse-
" back, and with wains, waggons, carts, or any other
" carriages, any stone, wood, &c. COAL, or other
" things, in, through, over, and along the aforesaid
" WAY, where, when, and in what manner to the
" said John should seem convenient.

" The Defendant then made Title under the said
" Grantee, and by force of the said Indenture justified
" passing along the said Way.

" The Defendants also justify the making of the
" FRAMED Road along the said Way, as a reasonable,
" proper, and convenient Way of repairing the same
" for carrying of Coals.

" The third Plea justified the making of the TRANS-
" VERSE Road.

" The Plaintiff, by way of novel Assignment, alleged
" that the fixing of the framed Waggon Way was

" other than such whereby the said Way was or could be repaired or amended: and was unreasonable, improper, and inconvenient, and not *pursuant or according to the Grant*.

" And by another *new Assignment*, that part of one of the said framed Waggon Ways in the Defendant's plea mentioned, was wholly *out of the way* granted by the Indenture.

" It appeared on the *Pleadings*, that the *Terminus* of the direct Road was the common *Higway*; that a Right of *depasturing* was reserved to the *Grantor*; and that the Road was to be repaired at the joint Expence of the *Grantor* and *Grantee*.

" A *special Verdict* was found: stating, among other things, that a *framed Waggon Way* was first made over THE SLIP OF LAND in the Year 1758, the Indenture in question having been made in 1732. That the Defendant could not so conveniently carry his Coals along THE SLIP OF LAND without the framed WAY.

" They then find *inter alia* the making of the TRANSVERSE WAY.

" A *framed Waggon Way* (though not particularly explained in the Verdict) appears to be formed by laying pieces of Wood along the Road at some depth in the ground, at the distance of the wheels on each side, joined and kept fast by bars at equal distances, and the interstices filled up with sand and gravel, so as to render the surface flat: and that they are now used for carrying the Coals from most of the Collieries in the North of England.

" The COURT was of opinion, that as to the *direct* Road the Defendant was most clearly and expressly entitled by the *Grant* to use it in any manner most commodious for the purpose of carrying his Coals: and therefore by a *framed Waggon Way*, according to the *Custom* of that part of the Island, with regard

Grant of Way, generally, means a customary and convenient Way according to the particular Purpose; transverse Way not included where the Evidence limits the original Intent.—Enclosures.—Prescription.

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“*gard to the conveyance of Coals, and to the finding of the Jury.*

“*But that the Grant gave but ONE Way, and the PASTURAGE reserved would be materially abridged by the Defendants making more: that the intent was ascertained and limited by the Covenant of Joint Repair: that, consequently, as to the TRANSVERSE WAY, the Action of TRESPASS was well brought.*”

Par. 3.

Enclosures.

On *Not guilty* the Defendant cannot give in *Evidence* the Defect of *Enclosures*, but “must plead it.

Co. Litt. 283.

“For in the eye of Law, every Man’s Land, in which he hath a *several* property, is inclosed and set apart from his Neighbours, if not by a *visible* material boundary, as one field is divided from another by a hedge, yet by a boundary which, though *invisible* and ideal, is that which alone renders inviolable the fences of stone, or brick, or wood, and distinguishes *property* from *usurpation*; the boundary of Right and of Law:

Comm. III.
p. 209, 10.

“So that he entered lawfully to pay or receive Money;—or in Right of common.

Par. 4.

Prescription.

In *Trespass* the Defendant must justify by reason of a *Prescription*; but cannot give it in *Evidence* on *Not guilty.*

Clayt. 54.

If the Defendant justify by a *Prescription* to tether *Equos et Boves*, he may give in *Evidence* the tethering of Mares and Cows; for the feminine Gender is within the Words of the *Prescription*.

“In

*Par. 5.**Pursuit of a Fox, or other noxious Animal.*

Geoff v.

Myndes.

Cro. Jas. 321.

Comm. III. 21.

2 R. Abr. 558.

S. C. and Mic.

37 Eliz.

Nicholas v.

Badger.

Gundry v.

Feltham.

T. R. 334.

Tr. 26 G. III.

“ In *Trespass*, the Defendant may *justify* that he
 “ came into the Close of another in *pursuit* of a Fox
 “ or other *noxious* Animal: but he cannot justify
 “ breaking Earth.

“ On Action of *TRESPASS*, for breaking and en-
 “ tering the Close of the Plaintiff with Horses, Dogs,
 “ &c. and for beating and hunting there for Game,
 “ and for breaking down, trampling, and destroying
 “ the hedges of the Plaintiff.

“ The Defendant pleaded,

“ *Firſt*, the *General Issue*,

“ *Secondly*, a *special Plea* of *Justification* to this
 “ effect.

“ That as to the breaking and entering the said
 “ Close with Horses, Dogs, &c. and spoiling a little
 “ of the Gras, and breaking a little of the Hedges
 “ and Fences of the said Close, being the *Trespass* in
 “ the said Declaration supposed to have been com-
 “ mitted, the Plaintiff ought not to have or maintain
 “ his aforesaid Action: for that before, and at the said
 “ times, the *Hounds* and *Dogs* were the property of
 “ *Humphrey Sturt*, a person qualified by the Laws of
 “ the Realm to keep and use the said Hounds, &c.
 “ and that the Defendant, before and at the said times,
 “ was *Huntsman* and *Servant* to the said *Humphrey Sturt*:
 “ and had *started* and found one of those destructive
 “ *Vermin*, or *Beasts of Prey*, naturally inclined to
 “ do mischief, called *Foxes*, in and upon certain
 “ lands

" lands near to the said Close, and in order to hunt,
" pursue, take, and kill the said Fox, and to prevent
" the said Fox from doing any mischief in the Neighbour-
" bood, he, by the leave and licence of the said
" H. Sturt, had caused the said Hounds, &c. to pur-
" sue the said Fox; which having ran out of the said
" lands into and over the said Close in the Declaration
" mentioned, he, in pursuit of the said Fox, and in
" order to take and kill the same, and as the only
" means of so doing, with ONE of the said HORSES,
" and with the said Hounds, &c. did follow after the
" said Fox with an intent to kill, and did kill and
" destroy the same, and in so doing did break and
" enter the said Close, and did tread down and spoil a
" little of the Grass, and a little break down, trample
" and destroy the said hedges and fences, as he law-
" fully might for the Cause aforesaid, doing as little
" damage to the said Plaintiff as be possibly could, which
" is the Trespass in the Plea mentioned, whereof the
" Plaintiff against the Defendant hath complained.
" Hereon there was a general Demurrer and Joinder in
" Demurrer.

" Lord MANSFIELD said, that by all the Cases so
" far back as the Reign of Henry VIII. it is settled
" that a man may follow a Fox into the Ground of an-
" other. That it was not necessary in this Case to
" enter into the exceptions, as this Demurrer disputed
" the general Proposition.

" Judgement was for the Defendant.

" But this Right is strictly confined to the Principle
" of presumed public Convenience.

" And

*But in sporting generally on the Ground of another,
the Sportsman is liable to Trespass, though he acquires
property in the Game.—Gleaning.*

Ld. Raym. 251.

“ And therefore Lord HOLT said, that if *A.* starts
“ an Hare in the Ground of *B.* and hunts it into the
“ Ground of *C.* the property is in the *Hunter*: but *B.*
“ and *C.* have each their Actions of Trespass against
“ him.”

Par. 6.

GLEANING.

In TRESPASS on *Not guilty*, the Defendant gives in Evidence that he came into the Plaintiff’s Ground to glean: this ought to have been pleaded, for it confesses the Act of Trespass, and justifies it as an Act lawful for him to do; and therefore it ought to be first exhibited to the Court to judge whether it be lawful or not: but if it had been pleaded, it had been a sufficient Justification: for by the *Custom of England* the Poor are allowed to glean after the Harvest; which Custom seems to be built on a part of the *Jewish Law*, that allowed the Poor to glean, and made the Harvest a general time of rejoicing.

Tr. per Pais,
438.
Norfolk
Summ. Affizes,
1668.

“ In a Book of very considerable Merit this Principle is also asserted, and this distinction laid down “ as founded upon a Case before Sir Matthew Hale. “ The Author of the *Commentaries on the Laws of England* has expressed himself approvingly on this opinion, and appears to have been particularly attentive to this Point. A Reference to it is to be found in the *Index*: notwithstanding it occurs but once in that extensive Work, and is then mentioned incidentally. Of late two Questions have been argued in the *Common Pleas*: in the first of which “ the Court on general Demurrer to the Defendant’s “ special

*Worledge v.
Manning.
C. B. E. T.
1786.*

“ special Plea of *Justification*, gave Judgement for
“ the Plaintiff, because it was not averred in the said
“ Plea that the Defendant was an *Inhabitant*, at the
“ time of the *gleaning*, of the *Parish* where the *Lands*
“ gleaned were situated: which was *Timworth* in the
“ County of *Suffolk*. That was a Case of *gleaning of*
“ *Barley*: but on this point the Court gave no opinion:
“ and nothing farther has hitherto been decided:
There the Plaintiff, had he demurred *specially*, and
“ assigned the Defendant’s not being averred an *Inha-*
“ *bitant* as the *Cause* of his Demurrer, the Defendant
“ would have *amended* his Plea by introducing that cir-
“ cumstance agreeably to the *reality* of the *Fact*.

“ It may be here noticed, that although several for-
“ mer Causes have proceeded to the *special Justification*,
“ they have stopped there: at least this was the first,
“ so far as hitherto appears, in which the Plaintiff ha-
“ zarded an Argument, and an Application for the
“ Judgement of the *Court* on *Issue* joined in *Demurrer*.

“ These special Pleas *justifying* under a *Claim* of
“ *Right to glean*, have been drawn by different Coun-
“ sel of Experience and Ability. It does not appear
“ that it has been usually, if ever practised, prior to
“ this Decision, to introduce the circumstance of the
“ Defendant being an *Inhabitant*: nor does the Prin-
“ ciple upon which the *Claim* is founded obviously
“ suggest the Idea, that such Averment should make

“ a part

" a part of the Plea under which the Defendant *justifies* as a *Gleaner*; an Usage much prior to the Division of Inhabitants and their Lands by *parochial Limits*, and which has for its Basis a much more general Principle than that of the relation between a poor man and the parish where he lives. This does not mean to say, that from evident convenience a special Custom would not be good *limiting* it to *Parsifioners*: but only, that such could not have been obviously inferred, previous to this Determination, to be the universal Restriction of the Right.

Steele v.
Houghton et
al. E. & T. T.
1787.

*de Jannen said
et al. the right.
vid. 14 Ad. 57.*

" There is now depending in the same Court another Cause, upon which the Claim of **GLEANING BARLEY** was expected to be brought to a Decision. It was in two successive Terms solemnly argued, as had been the precedent Question; and stands over for the Opinion of the Court.

Vol. II. p. 101.

25 H. VIII.
c. l.

" AYRES, in his Comparative View of the *English* and *Irish Law*, adopts the opinion suggested by Blackstone: and refers in his Note to two *Irish Statutes*, for the opportunity of examining which I am indebted to a Gentleman, who, for the Variety and Extent of his Knowledge in biblical Learning and Questions of constitutional Right, may be justly called the **SELDEN** of our Times.

" Each of these Statutes is meant to be inserted in the APPENDIX: the first confines gleaning to persons

“ sons that are not strong of Body to labour for their
“ living : and provides that no impotent persons shall
“ glean except in the parish where they dwell : the
“ second, against leazing while the Corn is in reak.

“ Let me add, before I quit this subject, that there
“ seems to have been too many instances in which
“ English Farmers have overlooked the Difference be-
“ tween *gleaning* and stealing.

“ In the Case of *Rex v. Price* the Magistrate seems
“ to have been led by the strength, to say no more, of
“ the Farmer’s Charge into a Misapprehension on this
“ subject.

“ This was a Commitment of certain poor Inhabi-
“ tants of Berkshire for FELONY, on the charge of
“ stealing Barley under pretence of gleaning it. An
“ Information was moved: Sir Fletcher Norton con-
“ tended for the Rig. of the poor to glean after the
“ Crop is carried. And that in an Action of *Trespass*
“ they would be justified under the Common Law for
“ so doing: that the Fact could not be a FELONY;
“ that it was at the utmost a *Trespass*; but in reality
“ neither; for that they had a *strict Right*.

4 Burr. Mansf.
1925.

“ THE COURT did not deny the existence of a
“ Right to glean; but thought the Justice had acted
“ from no malicious or oppressive Motives, merely on the
“ belief

“ belief that the *Gleaners* had not acted as such, but
“ had stolen. They therefore discharged the Rule for
“ an Information: and with Costs.

“ Happily we have yet no Statute that adds **GLEAN-**
“ **ING** to our Multitude of **FELONIES**: and it is now
“ somewhat late strongly to expect a Decision that
“ shall pronounce it a *Trespass*.

“ The Sentiments of three such Men as *Hale*, *Gil-*
“ *bert*, and *Blackstone*, carry a combined Force of Re-
“ spectability, which it is not easy to estimate too
“ highly: and this more particularly on a Question
“ equally distinguished by the Benevolence of the
“ Principle on which the Claim is founded, its vene-
“ rable Antiquity, and the almost universal Extent of
“ its Reception.

TITLE V.

TRESPASS.

L.N.P. 85.
Ca. K. B. 379.

“ If the Lord of a Manor cut down so many
“ Trees as not to leave sufficient Estovers, his Copy-
“ holder may bring *Trespass* against him, and recover
“ the Value of the Trees in Damages: and if the
“ Lord leave sufficient *Estovers*, yet he shall recover
“ *special Damage*; viz. for the Loss of his Umbrage,
“ breaking his Close, &c. therefore if the Lord have
“ a mind to cut Trees, he ought to compound with
“ his Tenant.

“ If A.

“ If *A.* make a Lease for Years, excepting the
“ Trees, the *Lessee* cannot bring *Trespass* against the
“ *Lessor*, merely entering to shew the Trees to a *Pur-*
“ *chaser*.

Lifford's Case:
xx Co. 46.

“ If *A.* plant a Tree on the extreme Limits of his ^{1 Raym. 737.}
“ Land, and the Tree in growing extend its Roots
“ into the Land of *B.* Evidence of this renders *A.* and
“ *B.* Tenants in Common: but if all the Roots grow
“ in *A.*'s Land, though the Boughs overshadow the
“ Land of *B.* the property of the whole is in *A.*

“ On Action of Trespass for entering the Plaintiff's
“ Close with Dogs and Gun, and killing the Plaintiff's
“ Deer, the Defendant pleaded *Not guilty*, and the
“ Jury found for the Plaintiff: on the Trial it had
“ appeared in Evidence that they were *out of the foot-*
“ *path*: and the Court refused to grant a new Trial,
“ for that it seemed an Act which might by sufficient
“ Caution have been avoided.

Beckwith v.
Shoredyke and
Hatch.
4 Burr. Mansf.
2092—4.
E. 7 G. III.

“ And to illustrate the Distinction, Mr. Justice
“ ASTON cited the Case printed in the Additions to
“ Lord Chief Justice Popham's Reports; which is
“ this:

Miller v. Fau-
drye, 161.

“ The Defendant with a little Dog chased the Plain-
“ tiff's Sheep out of his Ground, where they were
“ trespassing, and in driving them they went into
“ another Man's Ground, which had no hedge to
“ divide it from the contiguous Grounds of the De-
“ fendant, and the Dog pursued them on the other

L 1

“ Man's

TRESPASS not incurred by an *Act* properly inevitable.

“ Man’s Land. The Defendant, as soon as the Sheep
 “ were off his own Land, called in the Dog and chid
 “ him. The Owner of the Sheep brought an Action of
 “ Trespass for *chasing* his Sheep. The Court gave Judge-
 “ ment that the Plaintiff take nothing by his Bill ; being
 “ of opinion that *Trespass* lay not in that Case : for they
 “ held it to be an *involuntary* Trespass : whereas a
 “ Trespass that may not be justified ought to be *volun-*
 “ *tary*: they thought he might lawfully drive the
 “ Sheep out of his own Land with his Dog : and he
 “ did his best endeavour to recall the Dog when they
 “ were driven out. But the Nature of a Dog is such
 “ that he could not be recalled and withdrawn sud-
 “ denly and in an instant ; therefore Trespass did not
 “ lie against him for what he had done.

“ And, by Parity of Reason, the Man into whose
 “ Lands the Sheep were pursued by the Dog, could not
 “ have maintained TRESPASS, *clausum fregit*, on this
 “ Evidence.”

Clayt. 54.

Leon. 301.
 Keilw. 616.
 2 R. Rep. 682.

In *Trespass* the Defendant may give in Evidence
 that the Right of Freehold was in J. S. and he entered
 by his Commandment : for if the Defendant enters
 by the Command of J. S. it is the same as if J. S.
 had entered : and consequently, if J. S. hath the Right
 the Estate is vested in him by the Entry, and the De-
 fendant is no *Trespasser* on the Plaintiff ; and by such
 Evidence as this he plainly falsifies the Declaration of

Actio non facit reum nisi quadatenus Mens sit rea.

the

the Plaintiff; for he proves that he did not break his Close, as the Declaration sets forth: it is therefore proper for the general Issue.

In *Trespass* all the Defendants must be Principals: for no Man can, by commanding a *Trespass*, give any Man Authority to do it: and therefore no Man is guilty but he that acts in it: but in *Felony* the very commanding is punished “where the Act commanded “takes place:” formerly the very *intent* of Murder was Murder “when accompanied with overt *Act*;” and so the party was punished as a Murderer. Afterwards that altered; because it was not thought reasonable that the party should be punished unless the *Act* followed: and from thence came the Notion of Principal and Accessary: but in *Treason* the *intent* “manifested and exerted by overt *Act*,” is, “which “we shall see hereafter,” still Treason, and therefore they are all *Principals*: and in *Trespass* the *Intent* to trespass, “executed by the Instrumentality of another,” was ever reckoned a *Trespass*, “and reputed alike the “*Act* of the Doer and of the Commander,” and therefore there are no Accessaries.

VI. I. Comm.
35, 6.

SECTION II.

Of Actions *ordinarily* CIVIL.

CHAPTER I.

Of TROVER.

" We are now to examine two Actions which relate
" to *Property*, TROVER and DETINUE; and two
" which relate chiefly to the PERSON; as TRESPASS
" on the CASE, and TRESPASS VI ET ARMIS.

TITLE II.

Comm. III.
152.

" TROVER is an Action of which the Name is de-
" rived from the presumed *lawful finding* and *unlawful*
" *Conversion* of the Goods to the Use of the Finder,
" in prejudice of the right Owner.

" In this Action the *finding* is *formal*; and only
" gives Colour as it were to the Action: but the *Con-*
" *version* is material.

" By *Trover* not the *identical* Goods, but the *Value*
" shall be recovered.

" If a Gentleman lodge Jewels with a Banker for
" safe Custody in a sealed Bag, and the Banker open
" the Bag and pawn the Jewels, the Gentleman may
" bring *Trover* against the *Pawnee*.

TITLE III.

" From these introductory remarks it appears that,"
on the Issue of *Not guilty* in *Trover*, two Things are
to be proved:

First, *the Property*;
Secondly, *the Conversion*.

TITLE

TITLE, IV.

First, the *Trover*, that is, the *finding*:—that the Goods came to the Defendant's hands, and were in his possession.

Par. 2.

What shall charge with the Possession.

In *Trover* against Husband and Wife, the proving *Ibid.*
of the Goods in the possession of the Wife is sufficient :
for their property is but one, and the possession of the
Wife is the possession of the Husband also.

" We have observed that the *finding* is but *Inducement* to the *Action*: and therefore not only it needs not to be proved, but *Evidence* is good, which in its " Nature excludes finding. Therefore," if Goods be delivered by the Owner to *A.* to keep, and he converts them to his own Use, this is sufficient Evidence of *Trover*: for " the substance remains, which is the injurious Use of the property of another :" and come he by the Possession never so lawfully, yet if he convert " to himself the" property of another, the Owner must be redressed.

So if Goods be pawned, and the Owner tender the Money, and the Bailee refuse to deliver them, this is Evidence of a Trover: for when any Man has a naked possession, without a right of converting those Goods, the party may bring Trover: for the Words of the Declaration are, *ad manus et possessionem per inventionem devenerunt*; so that coming to his possession is the material part of the Charge; and if the Plaintiff proves

Cro. Ja. 244, 5.
2 Danv. Abr.
28. pl. 6.
85. pl. 10.
Yelv. 178.
Bulstr. 29.
Noy, 137.

that they came to his possession any other way it suffices: for it is not enough for the Defendant to say he had the Goods, though not *per Inventionem*; any more than to say that a Bond is his Deed, and deny the Date.

TITLE V.

*Of the Conversion.*Secondly, *Conversion.*

10 Co. 56, 7.
2 Sid. 127.
2 Bulstr. 314.
Cro. Eliz. 97,
495.
Cro. Jas. 245.
Cro. Car. 262.
Ventr. 401.
Hob. 187.
R. Rep. 59, 60.
Hut. 10
2 Bulstr. 303,
210.
"Grounds" for:
Ed.
Kol. Abr. 5.
Gouldsb. 152.
Morr. 460.

If a Man request his Goods, and the person who has the Possession *denies* to *deliver* them, this is good Evidence of a *Conversion*: for to what end should a man deny me my own, if he himself did not use it; so that upon such Evidence as this it is to be *presumed* that the Defendant hath converted them to his own Use.

Rolles makes a Distinction where *Goods* came to the Defendant's Possession by his *own Act*, and where by the Bailment of the Plaintiff; and that in the first Case a Request and Denial is a *Conversion*, but not in the latter Case: but this does not seem to be Law: for in both Cases the Request and Denial is no *Conversion*, but only *Evidence* of a *Conversion*.

10 Co. 56, 7.
2 Sid. 127.
Cro. Eliz. 495.
2 Bulstr. 314.
Ventr. 401.
Hob. 187.
Hut. 10.
Cro. Car. 262.
2 Salk. 655.
Leo. 173.
Danv. Abr. 21.
Mod. 244.
2 Mod. 245.
3 Mod. 2.
5 Mod. 426.
6 Mod. 212.
2 Show. 161,
179.

"For," though the Request and Denial be *Evidence* of a *Conversion*, yet "it is only *Evidence* to be left "to the Jury, and not absolutely a" *Conversion*: for the Jury are Judges of probable and improbable, and they on the circumstances mentioned may think it rather probable that there was a *Conversion* than otherwise; but if the Jury refer these circumstances to the Court, the Court cannot adjudge there is a *Conversion*, for the Court are not Judges of the probability of the Fact but

but of the Law; and there are not those circumstances that do necessarily amount to a Conversion, though they are such as would make a reasonable Man believe that there was a Conversion: for the bare denying of the thing, without using of it proved, is not in Law a Conversion of it to my Use: for a Denial *ex vi termini* doth not amount to an using of the thing demanded; it only makes a *Presumption of Fact* that I have used it.

“ Yet this Rule is qualified according to the Nature
“ of the subject:” for if *Trover* be for bare *Money*,
and a Request and Denial be proved, this is so strong
a Presumption of the Conversion that nothing can be
proved to the contrary: for the Presumption must
stand till the contrary be proved, and the contrary to
this Presumption can never be proved; for all Money
being exactly alike, that the individual Money found
was not converted can “ not” be proved.

² Bulstr. 374.
R. Rep. 132.

But if *Trover* be for Money in a Bag, though the Defendant doth not deny to deliver it, yet he may prove that there was no Conversion: for if he lays the individual Money sealed in the Bag in the place where he first had it, and hath Witnesses of its continuance there without Removal, this is no Conversion; and such Evidence will destroy the presumption that arose from his Denial.

So if the Owner requests a Man to deliver a Beam of Timber or a Sow of Lead lying in his Land, and he deny to do it, this is *prima facie* Evidence of Con-

Defendant may prove a general Property under the general Issue.

version; though less strong, because the Defendant in this Case could not deliver it without trouble and charge to himself, and that might be the reason of his denial, and not because he had applied it to his own Use: and in this Case, if the Defendant proves that the Beam or Sow is there still, after his Denial, this disproves plainly his Conversion.

TITLE VI.

What is and is not Evidence in Support of the general Issue.

Where the Defendant hath a general Property, he may give it in Evidence on the *general Issue*: for the general Issue is putting the Plaintiff to the proof of the Fact laid in the Declaration: part of which is the *Demand*, "founded on property in the Plaintiff," and that, "notwithstanding," the Defendant *converted* it to his own Use: so that the Plaintiff must prove a *property* in him, and the Defendant may prove a *better Title* in himself to falsify that Claim: and this is good Evidence on the *general Issue*: for it disproves the Fact laid in the Declaration; for it proves that the *Plaintiff* had not the property, and therefore that the Defendant did not "tortiously" convert it: for no Man can be said to convert that "from another" which was his own before: so that for the Defendant to make to himself a general property is "suitable to" the general Issue, because it doth falsify the whole Charge of the Declaration.

"One

Trover will not lie, but special Action on the Case, if
Goods be stolen from a Carrier.

521

" One Tenant in common cannot bring *Trover*
" against another: and on this principle was deter-
" mined a Case respecting a Friendly Society, who
" associated for relief of each other, in case of sickness
" or other disability, by voluntary contribution. The
" Plaintiff was *Treasurer*, the Defendant one of the
" Members of the Society; and for the Recovery of
" the Box, containing their Fund, this Action was
" brought. **"

Holliday v.
Campbell.
T. R. 653.
E. 27 G. III.

If a Man take my horse and ride him, and re-deliver R. Abr. 5.
him to me again, I may, " for this taking and using
" without Licence," have an Action of *Trover* against
him, notwithstanding the *Re-delivery*: for he had him
in his possession, and did convert him to his Use: and
his *Re-delivery* is only an Evidence in mitigation of
the Damages.

If I deliver Goods to a common Carrier, to deliver R. Abr. 6.
at such a Place, and these Goods are stolen from the
Carrier, this is no *Conversion* in the Carrier to maintain
this Action of *Trover*: for the stealing away the Goods
" from the Carrier" can never be reckoned (by any
manner of sensible speaking) a *Conversion* of the
Goods to the Carrier's Use.

But

* The Principle of these Societies is so laudable, and their Tendency so beneficial, that it has been wished they had a legal sanction, which might secure their property, and the application of it, without impairing the freedom of the Association. Perhaps the best Plan hitherto proposed with this View is that of William Young, Esq. M. P. in a Tract entitled Observations preliminary to a proposed Amendment in the Poor Laws.

Trover not good against an Officer who takes Jure publico.

But in this Case ("as it has already been at large explained") an Action may be brought on the *Custom of England*, that Carriers should safely keep all the Goods that are delivered to them; and the Evidence will maintain that Action.

"When *Purveyance* was in force the following point would have been without much difficulty settled:" the King's *Purveyor* takes *Beds*, and appoints the King's Servants to lie in them; this is no Conversion to his own Use, but to the Use of the King, and therefore may be given in Evidence to discharge the Defendant on an Action of *Trover*.

"*Purveyance* is now abolished by the Statute of Tenures, reducing the ancient services to free and common *Socage**; the most certain and liberal Tenure.

"Yet it may be still proper to notice, that as *Trover* is here rejected against a person, to recover from him in a private Capacity what he has taken as a public Officer, so *Affumpſit* hath been held not maintainable against the Governor of a Province for Money due upon Contract, in which Credit is given to him as Governor: for it is a public, and not a private Debt.

Macbeath v.
Haldimand.

"The Plaintiff brought his Action against the Defendant as *Agent*, for Work and Labour.

"The

* Of Soc, the Plough: for of AGRICULTURE our Ancestors thought very early with the Romans, NIHIL LIBERO HOMINE DIGNIUS.

" The Case, upon the Judges' Report, appeared to <sup>T. R. 172.
E. 26 G. III.</sup> be this :

" The Defendant in 1779, being *Governor* of *Quebec*, appointed Captain *Sinclair* to the Command of " a Fort on the Lake *Huron*, in the Province of *Canada*: and recommended the Plaintiff to Captain " *Sinclair* for the supply of *Indian Corn*, and other " Articles, at a certain Commission; and by another " Letter, on the day following, to the Plaintiff, informed him of the said Recommendation and Appointment, and that he was to execute orders from " Captain *Sinclair* accordingly.

" The Plaintiff furnished Articles to a considerable " Amount: and in his Bill charged *Government* as " *Debtor*: and when these Bills were sent to *Quebec*, " the Defendant objected to several of the charges as " unreasonable: and his Secretary by *official Letter* " informed the Plaintiff, that his *Excellency* would pay " to a certain sum; and farther, as by Merchants " mutually appointed by himself and the holders of " the Bills should be allowed.

" There were other Statements and Exceptions " which appear not necessary to be here recited.

" It was acknowledged at the Trial, that all Accounts had been submitted by the Defendant to a Board of Officers to examine and report; and that " the sum by them adjudged had been paid by the Treasurer: to recover the overplus of the Demand " this Action was brought.

" *Buller*

" Buller Justice at the Trial said, he was of opinion
" that the Goods in question were supplied for the
" Use and on the Credit of *Government*, and that the
" Defendant was not *personally* liable: and recom-
" mended a *Nonsuit*; to which the Counsel for the
" Plaintiff refusing to consent, he directed the Jury
" that in point of Law, they must find for the De-
" fendant.

" On the Motion for a new Trial, it was contended
" that the Defendant had, by his Letters and the other
" circumstances, made himself personally liable: that
" if this were doubtful, it ought to have been left to
" the *Jury*; the import of *Letters* being open to their
" Discretion, and not like the technical Construction
" of *Deeds*: and that therefore the *direction* was
" wrong, and a *new Trial* should be granted. It was
" not disputed, that generally, and without particular
" undertaking, express or implied, a public Officer
" is not liable in his personal capacity for a Debt in-
" curred on account of *Government*.

" Willes Justice was of opinion that the *Letters*, for
" the reason given, ought to have been left to the
" *Jury*: but that, on the whole Case, the Verdict
" ought not to be disturbed.

" The other Judges held that the *Letters* not being
" denied, their *import* was a conclusion of Law appro-
" priated to the Court; and all agreed, that on the
" construction of them, and of the other particulars
" of

" of the Transaction, nothing appeared to place the
" Defendant in a state of personal liability.

" There is a similar Decision where the Contract on
" account of Government was by Deed. And where
" a person shall not even be liable in *Assumpsit* or *Co-*
" *tenant*, still less shall he in *Trover*, which charges a
" *Tort*."

Unwin v.
Wolseley.
E. 27 G. III.
T. R. 674.
Vi. etiam
L. N. P. 45.
Pestey and
Dawkins.
Hil. 8 W. III.
Str. 6.

A Man lends his Horse for a special purpose, and the Defendant misuses him: this is no Evidence to maintain *Trover*: for though the Horse be misused in the Journey, this is not a Conversion to the Defendant's Use;

But " it" is Evidence to maintain a *special Action on the Case*, though not *Trover*.

But if a Man lend his Horse to go to *York*, and he goes to *Carlisle*, this Evidence will maintain *Trover*: for this is an Action contrary to the express Bailment, and consequently a " tortious" Conversion of the Plaintiff's Horse, in the Defendant's Possession, to his own Use.

" But if a Man hire or borrow an Horse for a Journey, and ride away with it, intending never to return it, so that by circumstances the purpose of stealing fully appeareth, the Owner shall not bring *Trover* for this Horse: for the *Trover*, as before of *Trespass*, merges in the *Felony*.

Specification.

38 Eliz. B. R.
per Fanner,
Str. 576.

If the Nature of the thing be altered, this is good Evidence of the Conversion: as if Leather be taken and made into Shoes: but this is no good Evidence on the Writ of *Detinue*: "for a reason to be assigned "in the next Chapter."

Ciat. 57.

Oats were taken from the Owner and carried to the Mill to make it into Meal: and before it was done, the Owner comes and prohibits the Miller, who notwithstanding proceeds to grind it: this is a *Conversion* in the Miller; for it is an Alteration of the property by him in whose possession it is contrary to the Will of the Owner.

Golightly v.
Reynolds.
Mic. 12 G. III.
C. L. 88.

"Where Goods have been stolen, and their identity ascertainable, the Felon is prosecuted to Conviction, and the Owner hath omitted to pray a Writ of Restitution, he shall recover in *Trover* against the Sheriff. The same Remedy holds if a Note be stolen, and Goods purchased with it, if the identity of both can be established.

Davis v. Mor-
rison.
E. 13 G. III.
C. L. 185.

"One *Deeds* bought Plate of *Morrison* the Defendant, and gave him a *Draft* on a Banker: on this *Draft* the *Defendant* gave a *Receipt* as for Cash. *Deeds* pawned the Plate to the Plaintiff a *Pawn-broker*, shewing him the *Receipt* as Evidence of his Property in the Plate. The *Draft* being on a Banker with whom *Deeds* had no Cash, *Deeds* was convicted, on the suit of *Morrison*, for obtaining Goods under false pretences. *Davis*, on the Trial, produced

“ the Plate as Evidence for the Conviction of Deeds :
“ Morrison detained it. Davis, for the Recovery of
“ his Goods, brought this Action of Trover. The Jury
“ found a special Verdict, stating these Facts for the
“ Opinion of the Court.

“ The Court was of opinion that neither at common Law, nor by Statute, was the Plaintiff precluded of this Action.

1 J. I. c. 21.

“ The Plaintiff brought Trover to recover a Pointer, which he proved to be his property; and that twelve Months after his loss of it, the Dog was found at the House of the Defendant, who refused to deliver it up, unless paid twenty shillings for so many Weeks keep.

Binstead v.
Buck.
Mic. 17 G. III.
C. P.
2 Bl. Rep. 1117.

“ A Verdict was taken for the Plaintiff, subject to the opinion of the Court on this Question, whether this Refusal amounted to a Conversion.

“ The Court were of opinion it did: and therefore Postea to the Plaintiff.

“ But Trover will not lie against an Innkeeper for an Horse, unless the Plaintiff have tendered payment for what the Horse has eaten: not so, where an Horse is put out to Pasture for so much per Week; for in this Case there is no Right of Detainure, but only an Action against A.

L. N. P. 45.
2 Show. 161.
C. o. Car. 271.
James v. Price.
E. 13 G. III.
C. L. 219.

“ The Plaintiff agreed to exchange a Vessel of his own, named the Folly, for one belonging to the Defendant,

Trover not good where the Property transferred by Agreement.

" defendant, named the *Rooker*. The Plaintiff was to give twenty-five Guineas to boot; and if the *Folly* was lost in the Voyage upon which she then was, thirty. And a Guinea was paid by the Plaintiff in name of *Earneſt*.

" The Defendant afterwards wrote to the Plaintiff, excusing himself, for that he had sold the Vessel. The Plaintiff insisted on the Contract: the *Folly* was lost in another Voyage.

" The Plaintiff had previously tendered the twenty-four Guineas, which the Defendant had refused to accept: whereupon he now brought *Trover*.

" The JUDGES of the King's Bench were of opinion that the property was completely transferred to the Plaintiff by the Contract with *Earneſt* paid: and consequently that *Trover* was rightly brought upon the subsequent tortious *Conversion* by refusing to deliver the Vessel on Notice and Tender of the remaining payment."

In *Trover* by an Administrator, where the *Conversion* was in the time of the *Intestate*, the Plaintiff must shew his Letters of *Administration*: for he must in this Case prove possession in the *Intestate*, and that he is his Representative: but where the *Conversion* is after the Death of the *Intestate*, he needs not "to" shew them: for there he "has" only to prove possession in himself (which is a good Proof of a Title *prima facie* against

against all persons that cannot shew a better Right) and “they” being taken and converted out of his possession, he will maintain his Action.

“ But on the Question, whether *Trover* will lie “against an Executor on a Conversion in the Life of “the Testator, the Case now to be considered was “very fully discussed.

“ In *Trover* against an *Administrator cum Testamento annexo*, the Declaration laid the *Conversion* in the “Life of the Testator: the Defendant pleaded that “the Testator was *not guilty*. Verdict for the Plaintiff. The Defendant, in *Arrest of Judgement*, insisted that this was a *personal Tort*, and died with “the person.

Hambly et al.
v. Trott, Admi-
nistrator.
Cwmp. 371.
Hil. 16 G. III.

Collins v. Fen-
nerel.
Palm. 330.

“ On the other hand, it was contended that the “wrong indeed, as the subject of a criminal suit, died; “but the personal remedy founded on the right of “property survived, and was pursuable by this Action.

“ Lord MANSFIELD stated the Case; the Plea; “and the Ground of the Motion: and then proceeded to notice,

“ That the Maxim *Aetio personalis moritur cum persona* was not generally, much less universally, true: “and left therefore the Law undefined as to the kind “of personal Actions which die with the Testator, or “survive against the Executor.

“ That the Conclusions deducible from the Cases “appear to be relative either to the survival or ex-

“ extinction of Actions on account of the Cause, or on
“ account of the Form.

“ That where the Cause of Action is Money due,
“ or a contract to be performed, or a promise of the
“ Testator, express or implied, there the Action sur-
“ vives against the Executor: but where it arises *ex*
“ *Delicto*, there it dies; as on battery, false imprison-
“ ment, nuisance, and in other similar instances.

“ That as to the effect of the Form in supporting, or
“ leaving without support, Actions thus framed: in
“ some the Defendant could have *waged bis Law*; and
“ in that Form no Action lies against an Executor.
“ To these other Actions have been substituted on the
“ same Cause, from which the *Wager of Law* is ex-
“ cluded, which do *survive* and lie against the Exe-
“ cutor; but no Action, where the charge must be
“ *Quare vi et armis et contra pacem*, or where the Plea,
“ as in this instance must be, that the *Testator* was *not*
“ *guilty*, can lie against the Executor: for upon the
“ Face of the Record, the cause arises *ex delicto*, and
“ all private criminal injuries, as well as all public
“ Crimes, are dead in Law and buried with the Of-
“ fender.

“ That the Action of Trover being in Form a *fictitious Tort*, but in *substance* founded on *property*, for
“ the equitable purpose of recovering the *Value* of the
“ Plaintiff’s specific property used and enjoyed by the
“ Defendant, if no other Action could be had against
“ the Executor, it must seem inconvenient and unjust
“ to exclude this.

" But that in Fact, other Actions do lie in most,
" if not all, the Cases in which *Trover* might have
" been brought against the *Testator*.

" Thus an Action on the *Custom of the Realm* will
" not lie against the *Executor* of a common Carrier:
" for it charges a *Tort*, and the Plea is, *Not guilty*.
" But *assumpsit* will lie.

" That there is a Case in *Sir Thomas Raymond*, which
" sets this point in a clear light. There the Plaintiff
" declared for a *Cow* delivered to the Defendant's
" *Testator*, for the Use of the Plaintiff, and which
" the said *Testator* had *kept* and *converted* to his own
" Use, by selling it, and appropriating the Money to
" himself. Upon this Case the Nature of the Action
" obliged the *Executor* to plead *not guilty*. And after
" Verdict the Defendant, in Arrest of Judgement,
" insisted that this being a *TORT* died with the per-
" son. * And the Court held accordingly.

*Bailey v. Birdes
et Ux. Executrix.*

" That this distinction is of considerable Antiquity:
" as appears by the Case in *Saville*, to which *Sir Tho-*
" *mas Raymond* refers, and which marks with clear-
" ness and precision to what extent the *Executor* shall
" be chargeable. That was the Case of *Sir Henry*
" *Sberrington*, who had cut down Trees on the
" Queen's Land. Upon an information against his
" Widow, *Manwood* Justice says, *in every case where*

* *A dolo injuriarum moritur cum persona.*
In restitutionem, non in paenam, succedit bares.
Neminem oportet ex Injuria alii illata firi locupletiorem.

Plaintiff may waive the Tort in the taking, and bring Trover notwithstanding.

" any Price or Value is set upon the thing in which the
 " Offence is committed, if the Defendant dies, his
 " Executor shall be chargeable: but where the Action
 " is for damages only in satisfaction of the injury done,
 " there his Executor shall not be liable.

" That therefore so far as the *Tort* itself goes, the
 " Executor shall not answer; for this dies with the
 " person: but for the profit which has accrued to
 " him without right, the responsibility survives, and
 " is a charge on the Assets in the hands of the Exe-
 " cutor, to be recovered not by an Action on the
 " *Tort*, but by one founded on the implied *Contract*;—
 " the Action for *Money bad and received*.

" That there are express Authorities disallowing
 " *Trover* against an *Executor* on a *Conversion* by the
 " *Testator*, and there is no saying that it does lie.

¶ Sid. 264.

" If the Reader has given his attention to the pre-
 " ceding pages, he is thence, if not earlier, apprized
 " that the Plaintiff may waive the *Tort* where the ori-
 " ginal taking is unlawful: and if he proves an ori-
 " ginal tortious taking which does not amount to a
 " Felony, he proves his whole Case: for if an un-
 " just taking of my Goods be proved, as the taking my
 Hat off my Head, this is a good proof of the Con-
 version, though there be no proof of a Demand and
 Refusal: for when I prove the taking away of any
 thing from me without my Leave or Allowance, the
 person must be supposed to take it to his own Use;
 for

for it cannot be supposed to be taken to my Use
which is taken away without my Consent.

" To this Action it is absolutely required that the
" property remain in the Plaintiff.

"Therefore where the Plaintiff had given *Money*
"and an *Horse* in *Exchange* for another *Horse* warranted
"sound, and which was afterwards discovered to be
"unsound, the *Court* agreed that *Trover* was ill brought,
"the property being transferred by the *Exchange*.

" And in this *Trover* has a characteristic difference Per Holt, " from *Trespass*: for" in *Trover* the Plaintiff must have *property*; not necessarily so in *Trespass*: for in *Trover* you admit the Defendant to have *Possession*, and therefore you must prove a better *Right*; but in *Trespass*, you have the *Possession* (for it supposes a Violation of the *Possession*) and against a wrong Doer this is sufficient.

TITLE VII.

*Where Trover and Trespass are convertible; and wherein
they differ.*

If a Man bring *Trespass* and *recover*, he can never afterward maintain *Trover*; but the former Action is a good Plea in Bar to the latter: but if a man bring *Trespass*, and Judgement be given *against* him, he may after maintain *Trover*: for if the taking be *tortious*, he may maintain *Trespass* as well as *Trover*: for

C. P. Ireland. where there is a Wrong in the very *Taking*, this, "as Lynch and Mercer. Tr. at Bar. bef Ch. J. Singleton. will presently be observed," is, in the understanding of Law, a taking with Force and Arms: and therefore in such Cases as these the party may punish either the *Taking* or the *Conversion*; and, consequently, this Evidence will maintain both Actions, either *Trespass* or *Trover*: but if a Man seizes the Goods by *Right*, and detains them by *Wrong*, there he cannot bring *Trespass*, which punishes the tortious *Taking* of any thing; but he ought to bring *Trover* where the *Gift* of the Complaint is for the *Conversion*. Now where two Actions are for the *same* Thing, one is a good Plea in Bar of another, to avoid Vexation "and "oppressive Abuse of legal Proceedings:" but where the two Actions lie for different things, as it is in *Trespass* and *Trover*, there the first cannot be pleaded in Bar of the last: for possibly on the *Trespass* I might prove the taking "of" my Goods, but not tortiously; and so the *Trespass* did not lie, but *Trover* only; and because I bring an Action that is not proper, it is not thence to be argued I should fail in that Action which is on all hands allowed to be proper: but if I fail in an Action that *is* proper for me, it is then consonant to Justice that I should not bring another upon the same Ground; for then, from the Justice of the former Determination, it is presumed to be a needless Vexation.

CHAPTER II.

Of Detinue.

“ The Distinction of this Action from that of *Debt* has been noticed already: it is nearly superseded, in point of modern practice, by *Trover*, which excludes the Wager of Law: though where the object is to recover the *identical property*, and not the Value, *Detinue* is still necessary. It was accordingly brought to recover the *Court Rolls of a Manor*.

² Bl. R. 853.
Pawley v. Holley.
Mic. 13 G. III.
L. N. P. 50.
Cro. El. 867.

“ Where the *property* is altered, *Detinue* will no more lie than *Trover*.

“ The *Detainer* must be strictly proved, as laid in the Declaration: and therefore if *Detinue* be brought for a Bond in a certain sum, *Evidence* of a Bond for a sum, more or less, will not maintain the Action.

² R. A. 703.

“ If the Defendant plead *non detinet*, he may shew they came to him by *Gift* of the Plaintiff: but he cannot, on this general Issue, give in Evidence that the Goods were delivered as a Pledge, &c.

Ibid.
Co. Litt. 283.

“ If a Man *detain* the Goods of a *Femme couverte*, which came to his hands before Marriage, the Husband solely must bring *Detinue* to recover them; but the Wife may join in an Action of *Trover*.

L. N. P. 50.
1 Lev. 103.

CHAPTER III.

TRESPASS VI ET ARMIS.

Comm. III. 8. “ The Action of *Trespass on the Case* is an universal
p. 122, 3. “ Remedy for *personal* Injuries committed without
 “ force ; and not falling under other *definite* remedy :
 “ it is peculiarly applicable where the wrong consisteth
 “ not in an *Act* done, but in a culpable *Omission* ; or
 “ where the damages are not *direct* but *consequential*.
 “ *Trespass vi et armis*, on the contrary, lies where the
 “ *Act* is originally *unlawful*, the Damages *direct*, or
 “ the really substantial Injury not liable to a separate
 “ Action.

L. N. P. 81.
Cro. Ja. 147.
V. supra, 502. “ In *Trespass* for taking a Gelding, the Defendant
 “ justified taking him as an *Estray*: the Plaintiff re-
 “ plied, that he laboured the said Gelding by riding
 “ and drawing with him, whereby he was much dam-
 “ nified: on *Demurrer* it was argued, the first *seizure*
 “ being *lawful*, *TRESPASS* should not have been
 “ brought, but an *Action* for the subsequent *Tort*:
 “ but the *Court* held he was punishable for the *Abuse*
 “ in an *Action* of *Trespass*, as a *Trespasser ab initio*,
 “ and that the using of the *Estray* was an *Abuser*; for
 “ it is not *lawful*, except in *Case* of *Necessity* and for
 “ the *Benefit* of the *Owner*, as to milk *Milch-kine*.

Oxley v. Watts.
Mic. 26 G. III.
T. R. 12.

“ This *Case* occurred in point very recently.

“ On

“ On the head of *consequential* Damages there arose
“ a Case too curious to be here omitted : as it shews
“ how nice and difficult of discernment the distinction
“ may sometimes be between Damages which shall be
“ said to be *direct*, and such as shall be accounted
“ *consequential*.

“ The Case was this :

“ The Plaintiff declared in *Trespass vi et armis*, for
“ that the Defendant, on the 28th Day of *October*,
“ 1770, with force and arms, at *Taunton*, in the County
“ of *Somerset*, made an assault upon the Plaintiff, and
“ greatly bruised, wounded, and ill-treated him : and
“ then and there threw a lighted squib, and struck
“ the said Plaintiff on the face therewith, and so greatly
“ burnt one of the eyes of the said Plaintiff, that
“ the Plaintiff underwent and suffered great and ex-
“ criciating pain for a long time (to wit, for the
“ space of six months then next following) and after-
“ wards wholly lost his said eye : and the Plaintiff
“ farther charged expence of 20*l.* occasioned by the
“ said hurt, hindrance in business, and loss of the
“ benefit of the sight of his said eye.

Scott, an infant,
by his next
Friend, v. Shep-
herd, an infant,
by his Guar-
dian.
3 Wilf. 403.

“ There was a second Count, omitting the charge
“ of assault : and as to the throwing of the squib and
“ its effects, it charged as the foregoing.

“ The third Count was limited to the Charge of
“ Assault.

“ The

" The Defendant pleaded *Not guilty*: and the " Cause came to be tried at the Summer Assizes of " 1772 for the County of *Somerset*, before Mr. Justice " *Nares*, when it appeared, by the *Evidence* of the " Plaintiff, that on the day charged, at *Milbourne Port*, " in the said County, in the Evening, it being the " day on which the fair was held, the Defendant " threw a large lighted *squib* from the street into the " market-house (which is a covered building, sup- " ported by arches, inclosed at one end, but open at " the other, and on both the sides) when a large con- " course of people was there assembled: that the said " *squib*, so thrown by the Defendant, fell upon the " standing there of one *William Yates*, who was then " exposing to sale gingerbread and other pastry wares " upon his said standing: that one *James Willis*, in- " stantly, and to prevent injury to himself and to the " said Wares of the said *William Yates*, took the said " lighted squib from off the said standing, and then " threw it *across* the market-house, when it fell upon " another standing *there* of one *James Ryall*, on which " he was also exposing the same sort of wares to sale: " and that the said *Ryall*, instantly, and to save him- " self and his said Goods from being injured, took up " the said squib from off the said standing, and then " threw it to another part of the market-house, and, in " so throwing it, struck the Plaintiff, then in the said " market-house, in the face *therewith*, and the said " squib so striking against the Plaintiff's face, and " the combustible matter therein bursting, put out " one of the Plaintiff's eyes.

" On

" On this Evidence the Jury found a Verdict for
" the Plaintiff, subject to the Opinion of the *Court of*
" *Common Pleas*, whether upon the facts above stated
" the Action is maintainable.

" Three of the Judges, the *Chief Justice De Grey*,
" *Nares*, and *Gould*, were of opinion the Action was
" well brought; *Blackstone* on the contrary. The rea-
" sons in support of the Action, which weighed with
" the Court, appear, from their opinions delivered
" *seriatim*, to have been chiefly these:

" That where a Man doth an *unlawful Act*, he
" renders himself liable *criminally*, and much more for
" *civil damages*, to the extent of the *consequences*, which
" follow in connection with such *Act*.

" That here was an *Act* done unlawful and dan-
" gerous, from the time, place, and other circum-
" stances; which *Act* originated with the Defendant,
" and terminated by the explosion to the Injury of the
" Plaintiff: so that the whole must be regarded as one
" continued *force* producing the *mischief* which it was
" originally of a nature to occasion. That the inter-
" mediate persons, acting in self-defence in repelling
" the danger from themselves, the Plaintiff could have
" no remedy against them, and was therefore intitled
" and necessitated to refer the forcible Injury to its
" proper Cause, the throwing of the *lighted squib* by
" the Defendant, by the bursting of which he was
" deprived of his sight.

" The

“ The *dissentient* Judge thought that, agreeably to
 “ the principles of the Case reported by Lord Ray-
 “ mond, an *Action on the Case* only would lie; and
 “ not an Action of *Trespass vi et armis*: for that by
 “ the Act of the Defendant no *direct* Injury was
 “ done to the Plaintiff, and only in *consequence* of that
 “ Act prejudice had been sustained, through the
 “ distinct Act of others, not by the instigation or with
 “ the concurrence of the Defendant.

“ That the Act of the Defendant was complete,
 “ and terminated by the fall of the squib on the spot
 “ to which he threw it; that the throwing of it from
 “ place to place afterwards was a *new* independent Act,
 “ which could not fall within the Limits by which
 “ this particular species of Action is legally circum-
 “ scribed.

Comm. III.
120.
Reg. 104.
27 Aff. 11.
7 E. IV. 24.

“ For a *Menace* an Action of *Trespass vi et armis*
 “ will lie: for it is an inchoate Act of *Violence*.

Comm. III.
739.

“ From an Attention to the Honour, and a refined
 “ sentiment as it seems of the Delicacy of the Sex,
 “ this Form of Action is applied in circumstances
 “ which otherwise appear hardly compatible with it.

Fabrigas v.
Mofbyn.
Cowp. 161.
Mic. 15 G. III.
V. et 2 Bl. R.
929.

“ An Action of *Trespass vi et armis* was brought
 “ against the Defendant for an Assault and false Im-
 “ prisonment of a native Minorquin.

“ The Plaintiff declared on an Assault at *Minorca*,
 “ in *London*, in the Parish of *St. Mary le bow*, in the
 “ Ward

Of Jurisdiction beyond Sea against a Governor for Excess.

“ Ward of *Cheap*, an Imprisonment for ten months,
“ and exile into *Cartagena*, in the Dominions of the
“ King of Spain.

“ The Defendant pleaded,

“ First, the general *Issue*;

“ Secondly, a special *Justification*; that he was
“ Governor of *Minorca*, and that the Plaintiff was
“ guilty of a Riot, and endeavouring to raise a Mu-
“ tiny: whereupon the Defendant, as Governor, seized,
“ detained him for six days, and banished him to *Car-*
“ *ttagena*:—with a protestation excepting to the locality
“ of the *Trespass* as alleged.

“ On the *Evidence* the Assault, Detention, and
“ Exile of the Plaintiff by the Defendant came before
“ the Jury: and for the Defendant Evidence was given
“ that the Plaintiff was a *Native of Minorca*.

“ That the *Minorquins* in general are governed by
“ the *Spanish Laws*, and occasionally resort to those
“ of *England*: that the Plaintiff resided in the *Ar-*
“ *raval* of St. *Philip's*, where on the Trial the power
“ of the Governor was represented to be *absolute*.

“ The Jury found for the Plaintiff with 3000*l.*
“ Damages.

“ A Bill

Bill of Exceptions in the above Case.

" A Bill of Exceptions was tendered, and sealed by
 " GOULD, Justice, before whom the Cause had been
 " tried.

" On the Bill of Exceptions it was contended, that
 " an Action could not be maintained in this Country
 " for an Imprisonment of a native Minorquin in Mi-
 " norca by the Governor of the Island.

" 2. That if in general it could, still upon the
 " Evidence, in this particular Case, it could not be
 " supported against a Governor so acting in the Ar-
 " raval of St. Philip.

" Not much stress was laid on the manner of charg-
 " ing the locality of the Trespass.

" Lord MANSFIELD, in delivering the Opinion of
 " the Court, said,

" That the objection, founded on the Plaintiff's
 " being a native Minorquin was wisely abandoned in
 " the latter part of the Argument: for that it was
 " impossible to contend he was therefore less intitled
 " to apply to the King's Courts for Justice than if born
 " within the sound of Bow Bell.

" That in the Defendant's Justification there is
 " nothing by which it is made apparent that he acted
 " in a judicial Capacity on this occasion, either in the
 " Arraval of St. Philip or elsewhere: all therefore of
 " a supposed peculiar Jurisdiction in that district is out
 " of the Case.

" That

" That it remained, whether as Governor the Defendant was exempt from this Action. And here too if such exemption exist, it must be pleaded: and if any thing it is a Plea in Bar of the Jurisdiction: he has admitted the Jurisdiction by the Pleadings, upon which this Bill of Exceptions comes to be argued: but not to rest the answer on this only: so far from its being true, that supporting an Action to lie in the Courts for an Injury committed by one private individual against another in Minorca, it would not, however, lie against the Governor, the more just and correct statement would have been, that if an Action in such circumstances would lie against no other person, yet against the Governor, emphatically, it would.

" In every Plea to the Jurisdiction, you must state another more proper and sufficient Jurisdiction: for if there be no other, that alone will give the King's Courts a Jurisdiction. Now in this Case, if the King's Courts could not hold plea, no other Court can. The Defendant is as a Viceroy: and LOCALLY, during his Government, no Action, civil or criminal, will lie against him.

" This too arising on the construction of the extent of his Authority under the King's Letters Patent, cannot be tried in Minorca: for no Question concerning the Seignory can be tried within the Seignory itself. And to lay down in an English Court of Justice such a monstrous Proposition as that a Governor, acting by virtue of Letters Patent under

" the

" the Great Seal is accountable only to GOD and his
 " own Conscience, that he is absolutely despotic, and
 " can spoil, plunder, and affect his Majesty's subjects,
 " both in their Liberty and Property, with impunity,
 " is a doctrine that cannot be maintained.

" That if the Conduct of the Governor had been
 " fairly *justifiable*, according to the local *Constitution*
 " of that Island, he might have proved his *Justification*,
 " and given the Facts, including the Laws and
 " Usages of that Island, in Evidence under the ge-
 " neral Issue: but that no such *Justification* was of-
 " fered at the Trial.

" Then as to the *locality*: this is sometimes a *for-*
mal exception, and at other times a *substantial* one:
 " where the proceeding is *in rem*, and the effect of the
 " Judgement cannot be had if brought in another
 " place, there the exception is manifestly of substance;
 " as in *Ejectment*, if laid in the wrong County, for
 " then the Sheriff cannot deliver possession; or where
 " in its Nature the Charge is *local*: but the exception
 " is only *formal* when in a *transitory Action* the Plain-
 " tiff, as he may, lays his *Venue* any where in *England*;
 " and because the real place is material to the Cause,
 " introduces it in his Declaration with the formal
 " *videlicet* in the Conclusion. Where the place is al-
 " together immaterial, the Plaintiff contents himself
 " with leaving it entirely out of his Declaration, gives
 " ground for Trial by charging the Cause of Action
 " as arising in an *English* County, and proves it
 " wheresoever in fact it took place.

" Now

" Now if the Plaintiff merely charges in *London*
" what the Nature of his Case compells him to refer
" to the *East Indies* or elsewhere, this will incur a
" Variance between the Declaration and the Proof in
" support of it, and therefore he shall first allege the
" place, and then assign it a fictitious locality, for the
" purpose of Trial: and the Defendant shall never be
" permitted to prove that the place thus set forth is
" impossible or repugnant; since the Plaintiff merely
" declares on the Truth and Necessity of his Case;
" alleging the real situation, for that the subject of his
" Complaint requires it, and annexing the *nominal*,
" which is merely in effect to say that he prays the
" Cause may be tried in *London*: as here, part of the
" Injury being the banishment from *Minorca* to *Cat-*
" *thagena*, it became necessary to state on the Decla-
" ration the place from whence as well as that to which
" he was banished.

" THE COURT was unanimous that the Action well
" lay, and was rightly brought.

* In Trover on not guilty pleaded, it appeared in Evidence that the Defendant was Tenant by the Curtesy of Lands in Ireland, and had cut down and sold the Trees from off the Estate, and that the Reversion belonged to the Plaintiff: and upon a Case made it was resolved, that in local Actions, as

Trespass quare Clausum fregit, the Plaintiff cannot prove a Trespass but where he lays it, nor lay it in any other place but where it is: but it is otherwise in Actions transitory as Trover; ergo, in this Case he may lay the Conversion here, and prove it to be in Ireland.

H. MSS III.
B. R. 7 A.
Styl. 332 (185)

CHAPTER IV.

Cf. TRESPASS ON THE CASE.

" The Action of Trespass on the Case is a Remedy
 " where I cannot charge any Act in itself criminal, or
 " directly prejudicial to me : but an *Omission* by which I
 " suffer, or a prejudice in consequence of an Act done by
 " the party against whom the Action is brought : thus
 " for diverting a Watercourse situate in the Defendant's
 " Land, and by which a necessary supply of water is
 " conveyed to the Land of the Plaintiff, Trespass of
 " *Clausum fregit*, and *Trespass vi et armis*, are each
 " plainly inapplicable ; but this Action of *Trespass* on
 " the *Case* is proper for the redress of such *consequential*
 " damage.

Comm. III.
 122.
 Hallifax's Anal.
 Civ. L. 89.

" Injuries to a person's health, by selling bad food,
 " by carrying on a noisome trade near him, by un-
 " skilful conduct as a physician or apothecary, by neg-
 " ligently or ignorantly conducting his suit at law, are
 " liable to this Action, which is equivalent to the *Ac-*
tio in factum composita of the Roman Law.

Stocks v. Booth.
 T. R. 428.
 Mic. 27 G. III.

" CASE was brought for disturbing the Plaintiff in
 " his Pew. The Declaration stated a *Right* to the
 " Pew, without laying it to be appurtenant to a Messuage
 " in the Parish.

" At the Trial of the Cause, the Plaintiff did not
 " set up any Claim from the Bishop, or shew an enjoy-
 " ment

Prescription without showing Ground of possible Title not good to maintain Action on the Case for the Possession of a Pew.

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" ment in respect of an house : but offered *Evidence* " of Possession for above sixty years : and would have " derived Title from one *Chapple*, to whom the Mi- " nister and Churchwardens, in the year 1718, gave " in writing their consent to build the Pew.

" The Judge directed a *Non-suit* : and on Motion for " setting it aside,

" After hearing the Arguments on this *Case*, the " Court was unanimously of opinion, that the *Non-
suit* was right, and that the *bare possession* was not " sufficient to warrant this Action for disturbance : but " if the Plaintiff had claimed it as *appertaining to an
house*, such *Evidence* would have been sufficient.

" On *CASE*, tried at the Summer Assizes at *Exeter*, " the Declaration stated that the Plaintiff was possessed " of an *ancient Messuage* in the Parish of *Biddeford* : " and that he had, as *appurtenant to that Messuage*, " the use and occupation of a certain *Pew* in the " Church in *Biddeford* : and that the Wife of the " Defendant sat in the Pew, and prevented him from " enjoying it.

Rogers v.
Brooks et ux.
T. R. 431, n.

" The Defendant pleaded the *general Issue*.

" In *Evidence* it appeared, that about forty years " before the Action, the Church was pulled down : " and that when it was rebuilt, the Rector and Church- " wardens put the Family, under whom the Plaintiff

N n 2

" claimed,

*Otherwise, where claimed as appurtenant to a Messuage
within the Parish.*

“ claimed, in possession of the Pew, which they had
“ enjoyed uninterruptedly till about two years prior
“ to the Action.

“ That about thirty-six years past (at the time of
“ the Trial) the Plaintiff put a Lock on the Door,
“ and matted the Pew.

“ The Judge told the Jury, that after so long a
“ possession as thirty-six years, they might presume a
“ legal Title in the Plaintiff.

“ A new Trial was moved, on the Ground that there
“ was no Evidence to be left to the Jury. That the
“ Plaintiff’s own Witnesses had proved the Pew was
“ common, at the distance of forty years; and that
“ they had proved a Gift since the rebuilding of the
“ Church. This, it was contended, destroyed the
“ Evidence of a Title by Prescription.

“ Lord MANSFIELD said, the Question is, whether
“ there was any Evidence to be left to the Jury.

“ The Plaintiff’s Title to the Pew is, that it has im-
“ memorially belonged to the house. The Defendant
“ set up a joint Title. The Plaintiff, in support of his
“ Claim, proved he was put in possession by the Rec-
“ tor and Churchwardens about thirty-six years ago.
“ The Question is, whether this Act of the Rector was
“ to give possession under an old immemorial Right,
“ or in consequence of a new Gift. There are
“ strong reasons to induce us to suppose it was not
“ a Gift. They would not make a Gift of that which
“ other

Whether Action on the Case maintainable against a naval Commander for a malicious Prosecution of a subordinate Officer before a Court-martial.

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“ other people claimed. *A Gift cannot be made without a faculty.*

“ The *Winxford Family* (under whom the Defendant claimed) have acquiesced for thirty-six years: which is almost double the time required by the Statute of Limitations as a Bar in certain Cases.

TITLE II.

Whether Action on the Case maintainable against a naval Commander in chief for a malicious Prosecution of a subordinate Officer.

“ The Plaintiff sued in the *Exchequer* by *Trespass on the Case*, and reciting the War between Great Britain and France, and the United Provinces, and the command of the Defendant over a Squadron of Ships of War, and that the Plaintiff was Captain of the *Iris*, one of the said ships, proceeded to state the Action in *Port Praya Bay*, on the 16th of April, 1781, between the *French Squadron*, commanded by Monsieur *Suffrein*, and the said *British Squadron*, commanded by the Defendant: and that in the said Action the *Iris* was greatly damaged: and that after the engagement the *French Squadron* sailed away, and the commanders of the said *British Squadron* were thereupon ordered by the Defendant to slip their Cables and put to sea after the said *French Squadron*: and the Defendant, as Commander in chief, by sign-

Sutton v. Johnstone, T. R.
493.

Declaration in the above Case.

" nal caused the Squadron to form in line of Battle,
" and bore down with the said Squadron about sun-
" set, in order to engage the Enemy : but no farther
" engagement took place.

" And that although the Plaintiff, during the whole
" of the said Engagement and Pursuit, and bearing
" down on the *French* Squadron, and during the whole
" of the said 16th of *April* had behaved and con-
" ducted himself as a gallant, good, loyal, obedient,
" and faithful Captain and Commander of the said
" Ship of War called the *Iris*, and did his duty as such
" to the best of his power, skill, and ability, and the
" state and condition of the said ship, and was never
" guilty of delaying and discouraging the public ser-
" vice on the 16th of *April*, or at any other time, nor
" of wilfully or willingly disobeying the orders or
" signals of the said *Defendant*; nor of wilfully and
" improperly falling astern, and not keeping up in
" the line of battle, according to the signal then
" abroad, after the *Iris* had joined the Squadron, and
" cleared the wreck of the foretop-mast, when the De-
" fendant bore down upon the Enemy, or of any other
" neglect, disobedience, misconduct, or misbehaviour as
" Captain of the *Iris*; the Defendant, well knowing the
" premises, but *maliciously*, injuriously, and wrongfully
" contriving and intending to hurt the said Plaintiff in
" his good name, character, and reputation, as a Captain
" and Commander of a Ship of War in his Majesty's
" Service, and to cause him to be suspected of cowardice,
" treachery, disloyalty, disobedience of orders, neglect,
" and misconduct, and to bring him into great disgrace
" and

" and contempt with all his Majesty's subjects, and to
" deprive him of his rank and station of *Captain* of
" the *Iris*, and of the advantages and emoluments
" thereto belonging, and to subject him to the pains
" and penalties by the Laws and Statutes of the
" Realm inflicted upon Captains and Commanders of
" Ships of War guilty of Cowardice, Disobedience,
" and other the crimes aforesaid, and to put him to
" great labour and trouble of body and mind, and to
" great charges, and to impoverish and ruin him, he
" the *Defendant* being such Commander as aforesaid,
" afterwards, to wit, on the 22d of *April*, 1781,
" aforesaid, at *Port Praya Bay*, otherwise *Port Praya*
" *Road*, to wit, at *London* aforesaid, in the Parish of
" *St. Mary le bow*, in the Ward of *Cheap*, FALSELY
" and maliciously, and without any reasonable or probable
" Cause, charged and accused the said Plaintiff with
" having, on the said 16th of *April*, 1781, committed
" the crimes and offences of *disobedience* of his (the
" *Defendant's*) verbal orders and public signals, in not
" cutting bis (the Plaintiff's) *Cables*, and putting to sea
" after the Enemy; and for falling a-stern after he
" (the Plaintiff) had joined the Squadron, and not
" keeping in the *Line of Battle*, after he had cleared the
" Wreck of the foretop-mast, when he (the Defendant)
" made the signal for the *Line of Battle* a-breast, and
" bore down on the Enemy at sun-set.

" The Declaration (after stating the consequences
" imputed to this supposed disobedience and neglect)
" proceeds to charge that the *Defendant* falsely, ma-

" liciously, &c. and without any reasonable or probable cause, put the Plaintiff under arrest, in order to his trial by a Court-martial; and also wrongfully and maliciously, under colour and pretence of the said supposed crimes, suspended him from his office, post, and rank as Captain and Commander of the *Ijs*, until a Court-martial should be held: and maliciously, and without any probable cause, sent the Plaintiff to the *East Indies*, and thence to *Great Britain*, in order to be tried by a Court-martial for the said supposed offences: and maliciously, and without any reasonable or probable cause, kept him in imprisonment and suspension from the said 22d of April, 1781, to the 11th of December, 1783.

" The Declaration next charges the Trial before the Court-martial the 1st of December, 1783, as upon a false and malicious Charge, and the Acquittal by the said Court in Terms the most full and particular, concluding, that he be honourably acquitted of the whole of the Charge.

" And it terminates in stating losses by the ademption of his share, as Captain, in prizes and captures taken by the *Ijs* during his suspension, expences in defending the Charge, and general damages to his name, character, and reputation.

" The second Count was the same as the first, omitting to charge the allegation of consequences of the supposed disobedience of orders.

" The

" The third Count, after reciting the introductory matter, declares on the charge, arrest, and suspension, and proceeds, that *although it was the duty of the said Defendant, as Commander in chief, to have holden, or caused to have been holden, a COURT-MARTIAL, for the said supposed neglect and misconduct, WHEN AND SO SOON AS he reasonably and conveniently could, after the said charge, arrest, and suspension ; and although he might reasonably and conveniently have holden a Court-martial, for the purposes aforesaid, during the stay of the Squadron at Port Praya Bay, as well as often after the departure of the same, there being, during all such time, a competent number of Officers, of and in the said Squadron, to compose such Court-martial, and although he was frequently requested by the Plaintiff to hold the same accordingly ; he, well knowing the premises, wilfully, wrongfully, and contrary to his duty as Commander in chief, omitted, neglected, and refused to hold a Court-martial until the first of December, 1783.* It then states substantially as in the first Court.

" There was a *fourth Count*, not materially different from the third.

" The Defendant pleaded the *general Issue*.

" The Cause was twice tried before the *Chief Baron at Guildhall*.

" The first *special Jury* gave 5000*l.* damages ; the second, 6000

" The

" The Court was moved in *Arrest of Judgement*, on
" objections taken to the *first* and *third* Counts.

" The first Objection was to the Charge of a mali-
" cious Arrest, Suspension, and bringing to Trial by
" a *Court-martial*: and to this it was objected, that no
" Action lies for a subordinate against his superior
" Officer for an Act done in the Course of Discipline,
" and under powers incident to his situation.

" The second objection was, that, supposing an Ac-
" tion could be brought by a party situated as the Plain-
" tiff, against one in the public station of the Defen-
" dant, for an Act done under powers resulting from
" such station, that in the particular Case the *Ground of*
" Action failed: for that upon the face of the Record,
" and on the Plaintiff's own shewing there was *probable*
" Cause.

" There was another objection, that the *Damages*,
" as to part, were not properly *assigned*; for that in lay-
" ing the special damage by Loss of *Prizes*, there is
" no Averment of Title to *prize money*; that it does
" not follow, from the fact stated, that the prize
" money was lost; and that in point of Law, it was
" not lost.

" On the *third* Count, for delaying the Trial by
" *Court-martial*, it was objected, that short of *three*
" years, no time is limited by the law for the holding
" of a *Court-martial*.

" With

" With respect to the Assignment of the *special Damages*, the *Lord Chief Baron EVRE*, in delivering " the opinion of the Court, observed, that they were " clearly of opinion this objection must be over-ruled.

" That the damage was well assigned by stating the " loss happened by reason of the wrong complained of; " that the rest is matter of *Evidence*; and after Ver- " dict, if any thing can be suggested to have proved " the loss to have been so occasioned, it must be pre- " sumed. [✓] That in point of *Law*, a suspended Captain *Sid. 8 J. & J. 224,* " does not appear to be in such sense a Captain ~~actually where this point~~ ~~on board, as to be within the proclamation for dis-*cis* ~~merit~~ deto-~~ *tributing the prizes.* *merit.*

" As to the want of *probable Cause*, that the *Court-* " *martial* had indeed said, in a part of their sentence, " that the party charged before them, *Captain SUR-* " *TON*, was *justifiable* in not immediately cutting or " slipping the Cable of the *Iris* after his getting on " board; and hence it had been inferred, that it had " appeared to the *Court-martial*, and is accordingly " stated by the Plaintiff on the Record, that he had " disobeyed orders, and was driven to *justify* himself " by circumstances: and if so, there was *probable* " Cause for putting him on his Trial, though the cir- " cumstances, when proved, should be found to be a " Justification.

" That it is true the *Court-martial* is not necessarily " to be presumed to have used the Word in the *tech-* " *nical Acceptation* of another Forum; but that, on " com-

“ comparing this with other parts of the Sentence,
 “ where they acquit him generally, it does appear as
 “ if they intended to mark some special difference,
 “ and to imply that he did disobey, but was under
 “ circumstances justified in the disobedience.

“ And then the Question arises, if this be admitted
 “ the true meaning, whether the fact of disobedience,
 “ thus established, will not be a *probable Cause* for
 “ bringing him to a Court-martial.

“ That it might be perhaps a sufficient Answer,
 “ even taking the Defendant, in this Case, to have
 “ known the state and condition of the ship, and all the
 “ circumstances, which, in the opinion of the Court-
 “ martial, amounted to a *Justification*, that he was not
 “ bound to foresee, they ought necessarily to have this
 “ effect: but that the proper and satisfactory Answer
 “ in this Case is, that the *Court-martial* had acquitted
 “ him *generally* of the first charge, pronouncing that he
 “ *did not delay the service*: that it is impossible, there-
 “ fore, to find in the Sentence *probable Cause* for this
 “ part of the Charge. And if the Defendant have
 “ brought the Plaintiff to Trial on one Charge, for
 “ which there was *no* probable Cause, and on another,
 “ for which there was, the Declaration is *felo de se*, as to
 “ the former, but *good* as to the latter. And after
 “ Verdict, the Jury must be taken to have given
 “ damages for that part only which was *actionable*.

“ That as to the *delay* of holding a Court-martial,
 “ the limitation of time, beyond which it shall not be
 “ held,

" held, is by no means a legal licence to postpone holding one to the utmost limit of that time: but that it must be held within a reasonable time, otherwise suspension and arrest being incident to the power of holding such a Court, it would imply an Authority to imprison for three years prior to the judicial investigation of a supposed crime, and this could not be endured.

" But the great stress of Argument turned upon the Question already stated, whether an Action for a malicious prosecution (and of course for the other Wrongs charged in the conduct of it, or as consequences) will lie for a subordinate Officer against the Commander of a Squadron ?

" Upon this the whole Case necessarily turned: and it is from its Nicety and Importance only, that here the last place is given to it: in order to clear the Question of the particular points, and present this full and detached from objects of smaller Consideration, in the Conclusion of the Case.

" The *Lord Chief Baron* introduced his sentiments, and the Resolution of the Court on this capital Question, by remarking that the negative on the competency of such Action had been deduced from a supposed Analogy between the Case of a *Commander* and that of *Judges, Jurors, and the Attorney-general*, when proceeding upon information *ex officio*: there being no adjudged Case, or any Authority in the Law, that can be brought to bear on the point, so as to give it any support.

" That

*Case of Fabrigas and Mostyn, and other Cases adduced
as favourable to the Action.*

“ That the Case of *Fabrigas* and *Mostyn* required
“ much distinction and refinement to avoid its appli-
“ cation in support of this.

Wall v. Mac-
namara.
Sitting at West-
minster after
Mic. 1779.
T. R. 536. N.

“ Nor less strong was the inference to the present
“ from another Case still nearer in point of time :
“ which was an Action brought by a Captain in the
“ *African Corps* against the Defendant, as Lieutenant-
“ governor of *Senegambia*, for imprisoning him for
“ nine months at *Gambia*, in *Africa* : in which Lord
“ *Mansfield* left it to the Jury on the motives of the
“ Defendant’s Conduct from the facts in *Evidence* :
“ and compared the protection allowed to military
“ Officers to that extended to inferior civil Magistrates,
“ who shall not suffer for misapprehension or mistake,
“ but for deliberate Acts of arbitrary Abuse in the
“ exercise of the Authority intrusted to them. That
“ these are Cases in which one species of Action is
“ supported against military men in command, for acts
“ done by colour of their Authority, or, in the lan-
“ guage of one of the Propositions, under powers
“ incident to their situation : and it does not readily
“ occur why another species of Action, differing in
“ form rather than in substance, should not also be
“ sustained. That public Policy and Convenience, so
“ far as the Argument from these is admissible, apply
“ with the same force to each.

“ That the Court never had a Difficulty on this part
“ of the Case. That the principle of the Action is pretty
“ clearly ascertained in the Case of *Saville v. Roberts*,
“ and

“ and in that of *Jones v. Gwynn*, and is general and universal.

Salk. 15.
Jones v.
Gwynn.
Gilb. Rep. 185.

“ That to Judges indeed and Jurors it cannot apply :
“ because the Law calls them to the exercise of those
“ specific functions, and cannot with-hold faith and
“ credence from those whom it appoints to carry its
“ provisions into effect.

“ But a Commander in chief has a general Authority, to which sentence on those under his command is merely incidental, and is in the condition of every other subject in this Country, who, being intrusted with general powers, has responsibility annexed to his situation.

“ If it is meant that no Action lies for the exercise of powers lawful in the abstract, and not proved to have been unlawfully exercised in the particular Case, the proposition is clear and unexceptionable : but if it is contended that a Commander in chief shall with legal impunity bring a subordinate Officer to a Court-martial for an offence of which he knows him to be innocent, the proposition is too monstrous to be debated.

“ That there may be cases where the extent of the Power is and should be unbounded, while acting with a view to its *legal* object; but none where it is necessary or permissible that it should act without this object: and happily for those who live under the Constitution of a free Government, it is impossible

" fible to state a Case where it can be abused with
" impunity.

" That the Court entered into all the difficulties of
" the situation of an Officer, whose fortune and whose
" honour might come to be so staked. That these
" Considerations had found their weight: but not so
" as to exclude the established Jurisdiction of the
" Country: that, on the contrary, those Jurisdictions
" must be presumed equal to their functions: it must
" be presumed they will do their duty honestly; if
" they do, no man can have much to fear: to situa-
" tions which require indulgence, they will shew it:
" but that be the risque more or less, all men hold
" their situations in this Country upon the condition
" of having their Conduct measured by that standard
" which the Law has established. Men of Honour
" will do their duty, and abide the consequences.

" Judgement was accordingly for the Plaintiff.

" On Error brought in the *Exchequer Chamber*,
" besides the *general* Errors formally assigned, and
" those of a subordinate kind relative to the prize
" money, the *probable* Cause of Trial, and the
" Delay of a Court-martial, the Cause of Error was
" thus stated on the main Question, that *in giving the*
" *Judgement* *aforesaid*, *the said Barons of the Exchequer*
" *have decided upon a Question not cognizable in a Court*
" *of Law*: in as much as it appears that the said sup-
" posed offences were committed by the said *George* as
" Commander in chief of a Squadron of his Majesty's
" Ships

“ Ships of War in the due course of discipline, and
“ under powers legally incident to his station as such
“ Commander in chief.

“ The Counsel for the Plaintiff in Error argued
“ much on the inconvenience of subjecting a Com-
“ mander in chief to these Actions, and after urging
“ the supposed Analogy of the Case of Judges and
“ Jurors, contended there was a farther peculiar
“ ground of exclusion in these instances, from a ne-
“ cessary want of competence in a Jury to decide on
“ the Merits of a Question of naval Discipline.

“ That the proper Forum of Enquiry, if a su-
“ perior Officer had conducted himself oppressively
“ towards an inferior, was prescribed by the *Legisla-*
“ *ture*, a *Court-martial*: and that, although this will
“ not convey a compensation to the individual, there
“ are many instances in which private satisfaction is by
“ Law excluded.

22 G. II. c. 33.
§ 33.

“ That this is the first Action of the kind, though
“ there have been many instances that would have
“ supported it on the ground of *malice*, which has
“ been proved before Courts-martial, if this Ground
“ were capable of giving a support to the Action.

Le Caux v.
Eden.
Douglas, 580.

“ For the *Defendant* in Error it was argued, that
“ with regard to *Judges*, the principle urged by way
“ of Analogy protects only the Judges of the King’s
“ Courts of Record: but that the exemption here
“ supposed runs through all the Classes of naval sub-
“ ordination.

Miller v. Seare
and others.
2 Bl. R. 1141.

O o

“ That

“ That as to the Attorney-general, no Case can be shewn that he is not *civilly* answerable: so that the Argument is founding an unknown principle on another equally unknown.

Bout v. Cooper et al.
R. 25 G. III.
S. R.

“ That the protection of Law is in no Case farther extended than to Officers of the Revenue: yet where an Action of *Trespass cl. fr.* was brought against Officers of the Excise, it was determined, notwithstanding the incompetency of *that* particular Action, because the original Entry was *legal*, that an Action on the Case would lie for obtaining or executing the Warrant on bad Motives.

Sutherland v. Murray, coram Eye, Baron.
sittings after Easter, 1783.

“ That an Action of the same Form with this had been brought, where the Plaintiff was Judge of the Vice-admiralty Court in *Minorca*, and the Defendant Governor and Vice-admiral of the Island. And the Allegation there was, that the Defendant maliciously, and without any reasonable or probable Cause, suspended him from the said Office, whereby he lost his profits, &c. On the Evidence it appeared that General *Murray* had legal Authority to suspend till the King's pleasure were known; that having so suspended, he directed the Secretary of State to take the King's pleasure on it: that the General professed his readiness to restore him, if he made a particular Apology: that this condition of reinstatement had been approved by the King. Yet there the Plaintiff recovered 500*l.* and it was not attempted to arrest the Judgement. That this was the proper Action, when a Conduct generally legal was vitiated by the Motives.

“ That

" That as to the Argument of incompetency from
" want of skill in subjects collateral to the Question,
" it would exclude numberless Cases which fall per-
" petually within the province of the Jury: and
" some where the Issue is *directly* upon the knowledge
" exercised in a particular profession; as if this very
" species of Action were brought, (which by Law it is
" liable to be) against a Surgeon, a Physician, or a
" Lawyer, for ignorance in their respective professions,
" by which the Plaintiff is damnified. But an Action
" for a malicious Prosecution, *without probable Cause*,
" stands clear of other points of investigation than
" such as may reasonably fall within general apprehen-
" sion, on a view of Facts.

" The extreme difficulty in the Plaintiff's way is an
" Answer to the suggested inconvenience of these
" Actions, and at the same time sufficiently accounts
" for the Want of Precedents.

" Finally, the Opinions of the CHIEF JUSTICE of
" the KING'S BENCH and of the COMMON PLEAS
" were reported to the CHANCELLOR.

" They state that the essential Ground of this Action,
" as contradistinguished from that of *Trespass vi et
armis*, is, that a *legal prosecution has been carried on
without a probable Cause*.

" They give their grounds why a Court of Common
" Law should not go to the extent of pronouncing,
" that the prosecution for the supposed malice, of
" which this Action is brought, was without probable
" Cause.

" That with regard to the delay of holding a Court-
" martial, and the Averment that it is incident to his
O o 2 " Office,

“ Office, the contrary is true by the Statute Law of
 “ the Land. There is therefore no fact, upon this
 “ Allegation, to be tried by a Jury.

“ That in respect to the delay of bringing to Trial,
 “ it is a *mere* military Offence, the abuse of a military
 “ discretionary power, and the Defendant has not been
 “ tried by a Court-martial. That a Court of Com-
 “ mon Law, in this Case, has *no original Jurisdiction*.
 “ That it is like the Case of *Barwic* and *KeppeI*:
 “ and this objection they thought to be fatal.

“ That this was their Opinion upon the first, second,
 “ third, and fourth Points, supposing an Action for a
 “ *groundless prosecution* before a *Court-martial* to lie :

“ But that the great and important Question now
 “ brought into Judgement, for the first time, is, *whe-*
ther such Action can lie?

“ That the occasion has frequently arisen, and the
 “ impulse which might animate to such a Trial, has
 “ been warmly felt: yet till now it is without Usage,
 “ Precedent, or Authority to support it.

“ That the Wisdom of Ages has formed a Sea
 “ military Code, collected and digested in the last
 “ Reign into an Act of Parliament: that by this all
 “ violations of naval Duty are to be tried, and tried
 “ by a Court-martial.

“ That a Commander in chief, abusing his disre-
 “ tionary Power of bringing a Man to Trial, is, by
 “ the thirty-third Article, triable by a Court-martial.

“ And

" And on principle the same Court which tries the
" original Charge, ought to decide on the probable
" Cause for instituting such Prosecution, and bringing
" it to Trial. That the same military Jurisdiction
" ought therefore to pronounce on both,

" That the Salvation of this Country depends upon
" the Discipline of the Fleet : without discipline they
" would be a rabble, dangerous only to their Friends,
" and harmless to the Enemy.

" That Commanders, upon a Day of Battle, must
" act upon delicate suspicions, upon the Evidence of
" their own eye; must give desperate commands;
" must require instantaneous obedience; that a mili-
" tary Tribunal is capable of feeling all these circum-
" stances, and of understanding that the first, second,
" and third part of a Soldier is Obedience. But in
" what condition (their Lordships add) will a Com-
" mander be, if, upon exercising his authority, he is
" liable to be tried by a common Law Judicature ?

" That if this Action be admitted, every Acquittal
" before a Court-martial will produce one.

" That not knowing the Law, or the Rules of Evi-
" dence, no Commander or superior Officer will dare
" to act, and their inferiors will threaten and insult
" them.

" That the relaxation and decay of discipline in the
" Fleet has been severely felt. Upon an unsuccessful
" battle there are mutual recriminations, mutual
" charges, and mutual Trials: the whole Fleet take

“ sides with great animosity: party prejudices mix:
 “ if every Trial is to be followed by an Action, it is
 “ easy to see how endless the confusion, how infinite
 “ the mischief must be.

“ That the person accused is not without his remedy.
 “ He has that which, among military men, is the most
 “ proper; Reparation is done to him by an Acquittal,
 “ and he who has accused him unjustly, blasted for
 “ ever;—dismissed the service.

“ That these considerations inclined their Lordships
 “ to lean against introducing this Action. But that
 “ there is no Authority of any kind either way: no
 “ principle to be drawn from the Analogy of other
 “ Cases, which is applicable to Trials by a Sea Court-
 “ martial under the marine Law, confirmed, directed,
 “ and authorized by Statute.

“ That therefore it must be owned the Question is
 “ doubtful: and when a Judgement shall depend upon
 “ a Decision of this Question, it ought to be settled
 “ by the highest Authority.

“ Their Lordships the *Chief Justices* concluded, that,
 “ according to their opinion, it was not necessary to the
 “ Judgement in this Case. Because, supposing the
 “ Action to lie, they thought that Judgement ought to
 “ be given for the Defendant (the Plaintiff in Error.)

“ The Judgement in the *Court of Exchequer* was ac-
 “ cordingly *reversed* by the Lord CHANCELLOR.

“ And finally, the Cause being removed into the
 “ HOUSE OF LORDS, this Question was put to the
 “ Judges by order of their Lordships.

“ *What Judgement or other Award ought to be made
 upon the Record*, as it now lies before the House?
 “ Mr. Justice GOULD delivered the unanimous opinion
 “ of the Judges present, that the Judgement given in
 “ the EXCHEQUER CHAMBER ought to be AFFIRMED.

“ Whereupon it was AFFIRMED accordingly.

“ It

22 May, 1787.
 DOM.
 PROC.

“ It may not, however, be improper to observe, that
 “ the grand Question, whether in general such an Action
 “ will lie, not being necessary to the AFFIRMANCE OF
 “ the Judgement in the EXCHEQUER CHAMBER,
 “ cannot be understood to be included in this De-
 “ cision: and therefore that it is not yet ultimately
 “ determined that no Evidence will support an Action
 “ of this kind against a Commander in chief.

TITLE III.

Miscellaneous Remarks on the Evidence proper for this Action.

“ This Action of *Trespass* on the *Cave*, and not
 “ *Trover* or *Detinue*, is the proper Remedy for the
 “ Recovery of Animals, *feræ Naturæ*, in which a
 “ Man may have a *base* or *qualified* property when
 “ tamed and accustomed to a certain *Domicile* as it
 “ were, so long as they continue in that state of *man-
 “ suetude*, and return to their Master, not having lost
 “ the *Animus revertendi*, which is the Criterion of
 “ their being subject to a peculiar Ownership by the
 “ English as well as by the Roman Law: such as *Swans*
 “ upon a private Canal, *Peacocks* or *Pheasants* in a
 “ Garden or Paddock, *Doves* in a Dove-cot.

Comm. II.
392, 3, 4

“ We have seen the Application of the *et alia
 “ enormia* to the Action of *Trespass clausum fregit*: we
 “ have shewn that it is not owing to a particular Nicety
 “ of the Law with respect to directly charging certain
 “ offences: we shall now farther illustrate this, and
 “ confirm the true ground of the Distinction by an
 “ instance of the Action of *Trespass vi et armis*, where
 “ a special Damage existing, the Offence was directly
 “ charged: it is obvious therefore to expect its equal
 “ applicability at least to the Action of *Trespass on
 “ the Cave*.

*Farther Illustration of the Distinction where alia enormia
shall be generally pleaded.*

“ And thus nearly related are these Actions, as to
“ this Remedy, that it may be obtained from either,
“ when special Damage, as *Loss of Service*, for in-
“ stance, can be averred.

Bennet v. All-
cott.
T. R. II. 166.
Mic. 28 G. III.

“ Accordingly, the Father brought *Trespass* for
“ *breaking and entering his House, debauching his Daugh-*
“ *ter, (describing her as a menial servant) and getting*
“ *her with Child, WHEREBY he (the Father) lost her*
“ *service.*

“ The Defendant pleaded *Not guilty*. At the Trial at
“ the *Hereford Assizes* it appeared before *Perryn, Baron*,
“ that the Defendant, who was a Collector of the Land
“ Tax, visited the Daughter of the Plaintiff as a suitor,
“ but that at the time when his Entry of the house was
“ proved, in order to support the *Trespass*, he went to
“ demand payment of the Land Tax, when the Plain-
“ tiff being from home, his Wife invited the Defen-
“ dant into her Daughter’s Bed-room, she then lying
“ on the Bed, and left them there for several hours.
“ That the Plaintiff was a considerable Farmer, and
“ that his Daughter, who was thirty years of Age,
“ occasionally did *Acts of Service*.

“ The Jury gave a Verdict with *two hundred Pounds*
“ *Damages*, which the Judge thought not excessive.

“ A Motion was made to set aside this Verdict:
“ first, on the Ground of *excessive Damages*;

“ And secondly, that the Action could not be
“ maintained, the Daughter being above twenty-one,
“ and no Contract for service proved.

" In delivering his opinion on this Case, BULLER
 " Justice entered in general Terms into the considera-
 " tion of Damages :—that there was nothing like invi-
 " tation or consent to this Injury, on the part of the
 " Father, so as to bring it within the reason of Cases
 " where any damages beyond merely inconsiderable, or
 " more properly nominal, have been held to be excess-
 " ive on account of design or connivance in the party
 " complaining: but here they trusted to the Honour
 " of the Defendant who had introduced himself into
 " the Family on honourable Terms.

L. N. P. 27.
 Worley v.
 Biffet coram
 Lord Mansfield.
 Sittings after
 Hill. 1782.
 Foley v. Lord
 Peterborough.
 E. 25 G. III.
 B. R.

" That with respect to the Form of Action, had the
 " charge consisted merely in the debauching of the
 " Daughter of the Plaintiff, the remedy would have
 " been by *Action on the Case*: but that agreeably to
 " the opinion of Lord HOLT, where the offence is
 " accompanied by an *illegal* Entry of the Father's
 " House, he has his election either to bring Trespass
 " for the breaking and entering of the House, and lay
 " the debauching of the Daughter and loss of service
 " as *consequential*, or he may bring the Action on the
 " Case limited to the debauching of his Daughter, *per*
 " *quod servit:um amisi.*

2 Ld. Raym.
 1032.

" That in the present Case it is true that, if no *Tres-*
 " *p*ass had been proved the Defendant would have been
 " entitled to a Verdict: but that it is now perfectly
 " clear that a *licence* to enter cannot be given in Evi-
 " dence under the *General Issue*: the Plea of *not guilty*
 " only goes to deny the Fact of the *Trespass*; now as that
 " was

*Contract of Service not necessary to be proved in Actions of
this kind, to maintain the per quod servitium amisit.*

" was proved in Fact, the Plaintiff was entitled to a
" Verdict, and the only question was the quantum of
" Damages.

3 Burr. 1878.

" That with respect to the Objection that this Action
" cannot be maintained by the Father against the De-
" fendant for debauching his Daughter, *per quod ser-
vitium amisit*, no contract for service having been
" proved, it appears to have been perfectly well settled
" ever since the Case of *Poyletwaite v. Parkes*, that
" the action will not lie where the Daughter is of
" Age, unless there be some Evidence of Service. But
" that in Actions of this kind the slightest Evidence is
" sufficient; even milking Cows: and it is not at all
" material whether the Daughter be hired by the Year
" or whether she have any Wages, it being sufficient
" that she is a Servant *de facto*.

" That if this had been an *Action on the Case* the
" Objection could not, even then, have prevailed.

" We have already shewn that every other conse-
" quential damage properly so called, and not merely
" *direct* or *inclusive*, must have its resort to the *Action
on the Case*: and that the Adoption of *Trespass vi et
armis* is only where there are no special damages to
" support the Action on the Case, or when, though
" there be such, (as loss of Service or other specific
" inconvenience) the Injury yet comes under the gene-
" ral description of, *et alia enormia.*"

In *Trespass* for the *mesne Profits* after Recovery in Sid. 239.
Ejectment the Defendant cannot insist upon any Title that was over-ruled on the Trial in *Ejectment*: for once settling the Title shall be conclusive to the parties "with respect to any other Action of the Kind, while the Judgment in *Ejectment* stands": to avoid the Trouble, Charge, "and incongruity of such" Contention: but if the Defendant makes a new Title he ought to be heard; for the Defendant ought not to pay any Money in his own Wrong where he has a Title.

" This Action of *Trespass* on the *Case* is the proper Remedy for false Returns by a Sheriff, &c. so if a Mayor return a Cause to a *Mandamus*, which, "if true, were good, but is false in fact; though now by Statute the party may, in many cases, traverse the return, and is not put to his Action.

Bag's Case.
11 Co.
Walker and Griffith.
M. 26 G. II.
V. supra, 563.

" So for wilful misbehaviour in a ministerial Office, as denying a Poll to a person candidate for an elective Office, refusing to take a Vote, and not returning one duly chosen. And it needs not to be averred, on refusal of Poll or Vote, that, if taken, the Candidate would have been elected.

¹ *Vent.* 55.
² *Lev.* 55.

" So for refusal to take an examination. As if my servant be robbed, and he go to a *Justice of the Peace*, and pray to be examined touching the robbery, and the Justice refuse to examine him, whereby I am damned, and cannot proceed against the Murderer, I may have this Action against the Justice.

¹ *Leon.* 323.
² *Ca.* 456.

" *Windham* indeed there doubted: because the *Justice of Peace* is a Judge of Record, and for "such

" such thing as he doth in his judicial Character no
 " Action lieth: but *Periam* and *Anderson* answered,
 " that the Examination is not made by him *judicially*,
 " but *ministerially*, in such Cases, as a Minister.

" There is one species of Action of Trespass on
 " the Case, which is frequent, and of particular im-
 " portance: this is, the *Action of Escape*.

TITLE IV.

Of ESCAPE.

L.N.P. Ch. VI.
§ Co. 141.

Cart. 148.

2 Sound. 37.

Sid. 5.

Cro. Ja. 380.

Hob. 55.

V. Comm. III.

283, 4.—414—

6.

V. supra, 43, 4.

" If a Sheriff, or any other Officer, suffer any per-
 " son who is arrested on mesne process, or taken in
 " execution, to escape, the party aggrieved may have
 " this special Action on the Case against him: and it
 " is not necessary to set forth all the precedent forma-
 " lities of the Law; but the Plaintiff may declare
 " briefly on the substantial Ground of the Action.

" If the Plaintiff declare that he had *J. S.* and his
 " Wife in execution, and that the Defendant suffered
 " them to escape, and the Jury find specially that the
 " Husband only was taken in execution (it being a
 " Debt due from the Wife before Coverture) and that
 " he escaped, he shall have Judgement: for the sub-
 " stance of the Issue is found.

" So if the Jury find *J. S.* was taken by the former
 " Sheriff, and that he was legally in custody of the De-
 " fendant, who suffered him to escape: so if they find
 " he was taken on an *alias capias*, where the Plaintiff
 " declares on *Ca. sa.* for it is but a Repetition (as we
 " have observed already) of the same Process: so if
 " the

“ the Escape is proved on another Day than that on Cro. Ja. 380.
 “ which the Action commenced.

“ So if it be alleged that the Prisoner was sur-
 “ rendered to him in the Parish of *B.* and it proves to
 “ be in the Parish of *A.* for the surrender is the mate-
 “ rial thing, and it differs from *Trespass*, where every
 “ part of the Description is material.

Oats and Mack-
 lin.
 T. 9 G. I.
 per Raym.

“ If it appear in Evidence that the Prisoner was taken Cart. 148.
 “ upon a void Judgement, the Court having no Juris-
 “ diction on the subject, the Plaintiff cannot recover:
 “ otherwise on an erroneous one, the Court having
 “ Jurisdiction.

“ If *A.* be in custody at the suit of *B.* and a Writ Salk. 274.
 “ be delivered to the Sheriff at the suit of *D.* this is
 “ an Arrest in Law: and if *A.* escape, *D.* may sue the
 “ Sheriff on the Escape.

“ If the Prison take fire, or be broke open by the 1 R. A. 803;
 “ King’s Enemies, this will excuse the Sheriff: other-
 “ wise, if the Prison be broke open by the King’s
 “ Subjects. 4 Co. 84.

“ If a Prisoner in execution escape without the Assent
 “ of the Sheriff, and he make fresh suit, and retake
 “ him before any Action brought, this will excuse him:
 “ but by Statute he cannot give this in Evidence, but
 “ must plead it; and must also make oath that the
 “ Prisoner made such Escape without his Consent,
 “ Privity, or Knowledge.

“ After Arrest on *mesne* Process the Bailiff may suf- Atkinson v.
 “ fer the Prisoner to go at large, and shall not be Mattefon et al.
 “ answer- M. 28 G. III.
 “ T. R. 276.

" answerable as for an Escape, provided he has him
" by the Return of the Writ:

Ibid.

" But where the Arrest is in *execution*, if he voluntarily let him go a moment, it is an *Escape*, and if " he retake him, it is false imprisonment.

*Rex v. Warden
of Fleet.
Salk. MS.*

" To prove a *voluntary Escape*, the party escaping
" has been admitted a Witness: because it is a secret
" Transaction between the Prisoner and the Gaoler.

L. N. P. 67.

" If the Defendant plead no Escape, he cannot
" give in Evidence no Arrest; for he admits an Arrest
" by his Plea.

Cro. Jz. 657.

" In general, *Debt or this Action lie at the option of*
" the party injured, in case of an Escape: but if one
" have Execution on a Statute of Lands, Body, and
" Goods, and the Prisoner escape, then because the
" Lands remain in Execution, Debt will not lie, but
" only an *Action on the Case*.

¹ Lev. 191.
¹ Saund. 34.
¹ Sid. 305.

" But where Debt will lie, it is to be observed, this
" Action being given by the Statute, and founded on
" *Tort*, is not within the Statute of Limitations: otherwise it is held of *Action on the Case*.

" Before we dismiss this Article, it will be proper to
" notice some particular instances of *Action on the*
" *Case for consequential Damages*: that being, we may
" remember, the peculiar province of this Action as
" contradistinguished to *Trespass vi et armis*.

TITLE V.

“ It is good for a *Right of Way*: and this may be L.N.P. B. II.
“ understood to be reserved by necessary implication: Ch. 7.

“ thus, where J. S. had four Closes, and sold three Cro. Ja. 170,
“ of them, reserving the middle Close, to which he 189, 90.
“ had no Entry but through that which he had sold, Co. Litt. 156.
“ it was holden that although he did not reserve the
“ way, the Law reserved it for him.

“ If a Man have an ancient House, and another 9 Co. 53.
“ build so near as to darken his Windows, he has
“ remedy by this Action for the Loss of necessary
“ Light; otherwise for the mere Interception thereby
“ of an agreeable prospect.

“ If a Man keep an ancient *Ferry*, for which he is com- Bliflet and Hart.
“ pellable to provide, he may have this Action against 18 G. II. C. B.

“ one who sets up a new one near it: but not so of a
“ school set up near an ancient school: for the pub-
“ lic Interest in the free opportunity of Education is
“ to be preferred.

“ In Case, for digging a Pit in a Common, whereby Cro. Ja. 158.
“ the Plaintiff’s Mare strayed into it, and perished, L. N. P. 77, 8.

“ it seems that the Declaration ought to state Right of
“ Common for the Mare. Yet it is well observed,
“ that where the Defendant had a Verdict, and the
“ Plaintiff, to save Costs, moved in Arrest of Judge-
“ ment for this defect in the Declaration, it was ex-
“ traordinary he should be permitted to prevail: as if
“ the Defendant were to be deprived of his Costs be-
“ cause the Action against him was erroneous in form
“ as well as wrongful.

“ An

For keeping a Dog accustomed to bite, &c.—Where Servant, &c. can or cannot be examined.

Dy. 236.

“ An Action will lie for keeping a Dog *accustomed* “ to bite sheep, and which has killed sheep belonging “ to the Plaintiff: but in such Case it must be proved “ that the Defendant knew he used to bite sheep: and “ of this two instances is sufficient Evidence, or “ perhaps a single one.

³ Raym. 110.
Ca. K. B. 335.

“ And if the Owner, having knowledge of his “ Dog biting sheep, the Dog injures Animals of another kind, as by biting an horse, this too is actionable: for the former mischief was sufficient notice “ to the Owner.

Smith v. Pelah.
Str. 1264.

“ It having been once made known to the Owner, “ that his Dog bit a man, he appears answerable in “ this Action, though the man afterwards bitten had “ given some accidental occasion to it. Of Animals “ naturally savage, *Lions, Bears, Tygers, &c.* the very “ Nature implies notice: and these therefore the “ Owner keeps at his Peril.

² Raym. 1583.

“ Where an Action is brought against the Master “ for consequential Damages occasioned by the Neglect of the servant, the servant cannot be a Witness “ to prove there was no Neglect: unless he have a “ Release from the Master.

G. Hall, 1744.

“ On Case for negligently managing his Barge, so “ that he ran down the Plaintiff, LEE, Chief Justice, “ permitted all the men on board to be examined to “ prove there was no Neglect, the Owner being himself at that time asleep.

⁹ Co. 113.

“ For every Feeding by a Stranger a Commoner “ shall not have this Action, but the feeding ought to “ be such whereby the Commoner had some Loss.

CASE OF LITERARY PROPERTY.

" But one of the most curious and interesting Cases
" to which this Action has been applied, is that of
" LITERARY PROPERTY.

" This was an Action of *Trespass on the Case* for the
" publishing of *Thomson's Seasons*, whereby the Plain-
" tiff was deprived of the sale of 1000 Copies of the
" said Work, of which he claimed to be *the true and*
" *only Proprietor.*

Miller v. Tay-
lor.
4 Burr. Mansf.
2303, 2427.

" The Jury found a *special Verdict*, stating the *Sea-*
" *sons* to be an *original Work*, the purchase of it from
" the Author by the Plaintiff, to him and his Heirs
" and Assigns for ever: and that from the time of
" the purchase the Plaintiff had always a sufficient
" Number exposed to sale at a reasonable price: and
" that it was usual before the Reign of Queen *Anne* to
" purchase *PERPETUAL Copy Rights*, and to make of
" them *Family Settlements.*

" They find certain Bye-laws of the *Stationers' Com-*
" *pany* founded on the supposition of a property in
" Copies: and they find the Publication by the De-
" fendant without *Licence or Consent* of the Plaintiff.

" The JUDGES of the Court of KING'S BENCH
" delivered their Opinions *seriatim*, beginning with the
" junior Judge, Mr. Justice WILLES.

" He observed this was by the Verdict distinguished
" from the Case of foreign Books, or of those in which
" the Author might have been presumed to have re-

P p " linquished

*The great Case of LITERARY PROPERTY tried by
this Action.—That the Property claimed is founded on
the Principles of private Rights, Fitness, and public
Convenience.*

“ relinquished his Claim, or where the person who insists
“ on the Copy Right has withheld the supply, or
“ endeavoured to enhance the Price: that it was freed
“ from the difficulty regarding *Identity*, so that Imita-
“ tions, Abridgements, or Translations, could not be
“ affected by it: and that if there can be such pro-
“ perty, this Action is the proper Remedy.

“ That this would depend on whether such property
“ in the Copy of a Book or literary Composition exists in
“ the Author at Common Law?

S. A. c. 19.

“ 2. Whether it is taken away by the Statute?

“ He was of opinion that the Usage which consi-
“ dered such Copy as property was recognized by
“ public regulations and decisions: and that the Prin-
“ ciple on which it depended was founded in *private*
“ *Justice*, moral *Fitness*, and public *Convenience*; which
“ when applied to a new subject, make Common
“ Law without a Precedent; much more when received
“ and approved by Usage.

“ That with respect to the Statute, the Preamble
“ appeared to recognize a Right at Common Law:
“ as it proposes to obviate a *Liberty* taken against the
“ Consent of Authors or Proprietors: that the *enacting*
“ Clause speaks of *practices* to be prevented. For
“ these and other reasons he concluded that the Right
“ both existed at Common Law, and remained unin-
“ paired by the Statute of Queen Anne.

“ Mr.

That a Dereliction cannot be presumed by the Publication.

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—That the Statute supposes and does not take away the Right.

“ Mr. Justice ASTON entered into the philosophical Grounds of Property, as stated by the Author of the Religion of Nature delineated: and argued that the undetermined and general Interest in a State of Nature, in Things necessary to Life, and which were consumed by the Use, would not apply, in a State of civilized Society, to Things, of which the Benefit, with regard to Use, might be properly to the Community from the Nature of the Subject; but the interest in the lucrative produce private, equally from the Nature of the Subject.

“ That the best Rule both of Reason and Justice assigns to every thing capable of Ownership a legal and determinate Owner: that a Dereliction could not be presumed from the mere Act of Publication, which was necessary to render the Work profitable to the Author as well as useful to the public.

“ That the COMMON LAW, agreeably to the Language of Judge DODDERIDGE, is founded on the Law of Nature and Reason. Its Grounds, Maxims, and Principles, are derived from many different Principles: from the Civil and Canon Law, from natural and moral Philosophy; from Logic; from the Use, Custom, and Conversation among Men, collected out of the general Disposition, Nature, and Condition of human kind.

E. L. p. 154--4
161.

P p 2

“ That

Mr. Justice YATES contra—That the Principles do not prove the Existence of such Right.

" That the *Copy* of a Book has not only been familiarly but legally used as a *technical* expression of " the *sole* Right of printing and publishing.

" That the Statute of Queen Anne, in the enabling Clause, cannot be understood otherwise than as speaking of a *known, subsisting, transferable* property : " that the Cases in Chancery turn upon the supposition of such Ownership.

" That upon the whole, on the Principles of Reason, Morality, and Common Law, on the long-received Opinion, on the Sense of the Legislature, and the Judgement of the greatest Lawyers of their time in Chancery since the Statute, the Right of an Author to the Copy of his Work appears to be well founded, and the Plaintiff therefore intitled to Judgement.

" Mr. Justice YATES was of a different opinion. He noticed,

" That however particular, with regard to territorial property, the Law of England might be, with regard to personal, it had its great foundation in natural Law.

" That Value is not a convertible term with property. The Light, the Air, are inestimably valuable, but none can claim a property in them.

" That

*That the Principles do not prove the Existence of such
Right.*

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“ That the property of an Author in his Work is
“ absolute while it is in Manuscript: but is subject to
“ be determined by any Act inconsistent with exclusive
“ Ownership: and that such Act Publication is.

“ That all Arguments on the superior Value of lite-
“ rary Productions, and the Injury of violating the
“ Right in them, proceeded on the Assumption of
“ the very point to be proved: the Injustice they sup-
“ pose turns on the extent and duration of the pro-
“ perty; for if that, however valuable, be expired,
“ no Violation is chargeable to those who are then
“ exercising a common, not invading a particular
“ Right.

“ That this being claimed as a property in *Ideas* is
“ to be established by appropriating what cannot be
“ the subject of property: but which, from the in-
“ stant of their being communicated, are a *Gift* to the
“ *Public*, not a *Loan* upon *Condition*.

“ He then considered the Claim as deduced from
“ supposed *Usage*, by the finding of the special Ver-
“ dict, that Individuals had made bequests of this
“ Interest in Publications as a right of *perpetuity*.

“ That this Assertion of Individuals could not con-
“ stitute a customary Right: it could, at most, be
“ only Evidence of the *Opinion* of a Right: for that
“ no *private Contract* mutually accepted between the
“ parties can impose a Law on the *PUBLIC*.

“ That the *Principles* do not prove the Existence of such
“ Right.

" That a similar Observation would apply to the Bye-laws of the Stationers Company.

² Webb v.
Rose.
24 May, 1732.
Pope v. Curi.
5 June, 1741.
Forrester v.
Waller.
33 June, 1741.
The Duke of
Queenberry v.
Shebbeare.
3¹ July, 1758.

" That, with regard to the *Injunctions in Chancery*,
" even if perpetual, instead of temporary, they could
" have no effect in a Court of *Common Law* on a *Com-*
" *mon Law Question*. But that farther, they are all
" of them either Cases of *anticipated Publication*,
" where the Owner had never published or consented
" to publish, or Cases grounded expressly on the Sta-
" tute of ANNE,² or Cases of Patent for what are
" called *Prerogative*³ Copies.

² Knapton v.
Curi.
Eyre v. Walker.
9 June, 1735.
Motte v. Faulk-
ner.
28 Nov. 1735.
Gill v. Wilcox.
Tonson v.
Walker.
5 May, 1739.

" That no property could, by the Law of *England*,
" be capable of *perpetual Duration*, unless in respect
" of *Inheritance*, all personal property being total
" and absolute.

" That the Statute of ANNE appears to have in-
" tended an encouragement to Authors, by *vesting* the
" Copy in the Author and Publisher during a certain
" time: but that this, and the Clause for settling the
" Price of Books, if the Legislature understood the
" Authors to have an absolute property in them be-
" fore, must appear a strange encouragement: the
" penalty which consists in cancelling the Copies con-
" veys no profit to the Author: he has therefore
" no benefit but the temporary exclusive Right of Pub-
" lication; and to confer this as an advantage to him,
" shows that no prior permanent Right was recognized.

³ Stationers
Company v.
Wright.
27 Nov. 1681.

" That the same Principles which were assumed to
" found a Right of Perpetuity in the Author be-
" cause they were *bis sentiments*, and the Work was

" his Composition, would exclude the Non-supply of
" Copies being construed as an Abandonment, would
" exclude the obvious and proper security against such
" enhancing of Price as might virtually lock the Book
" from the public: that it was a restraint of the Right
" of Mankind in the Exercise of a Trade and Call-
" ing: that it furnished a source of perpetual litiga-
" tion from the obscure nature of the supposed pro-
" perty, and the unlimited time left open for its con-
" tinuance.

Stationers
Company v.
Partridge,
9 Feb. 1709.
11 A. B. R.
Lucas, 105.

" And that, on the whole, the Author has the sole
" Right for the particular time granted and limited
" by the Statute, but *no longer*: and that consequently
" the Plaintiff, claiming a *perpetual* and *unbounded Mo-*
" *nopoly*, has *no legal Right* to recover.

" Lord MANSFIELD, for the general Grounds on
" the Subject, referred to the two first Arguments:
" and then reasoned from Admissions in the remainder
" of his Opinion.

" That the allowed property before Publication had
" all the Characters supposed to exclude the Idea of
" property after Publication.—*Incorporeal*, not *in-*
" *disposable*; not the subject of *Trespass vi et armis*,
" *Detinue*, or *Trover*: only admitting Redress by this
" Action or a Bill in Equity for specific Relief.

" That no Disposal of the *Paper* can be construed a
" transfer of the *COPY* without, and much more
" against, the Consent of the Author.

*Lord MANSFIELD for the Right as founded in clear
primary Rules of Common Law.*

" That the *property* prior to the Act of publishing
" might equally go down from Generation to Genera-
" tion, and possibly continue for ever.

" The Common Law, as to the Property before
" Publication, cannot be founded in Custom. Before
" 1732 the Case of a Piracy before Publication was
" never put or supposed.

" It rests then on reasons of *Right* and *Fitness*. It
" is just the Author should have the profit of his in-
" genuity and labours; it is fit that he should judge
" when to publish, and whether he will ever publish;
" it is fit he should chuse the manner of Publication;
" what number, in what volume, in what print; it is
" fit he should chuse to whose hands to confide the
" Accuracy and Fidelity of the Impression.

" All these reasons (arguing now as at Common
" Law, *independent* of the Statute of Queen ANNE)
" subsist equally after Publication.

" All objections which hold as much to the kind of
" property *before* as *after* Publication go for nothing:
" they prove too much: and there is no peculiar Ob-
" jection to the property *after*: except that the Copy
" is *necessarily made common* after the Book is once
" published.

" But this Objection turns in a Circle: it first sup-
" poses the Law does not protect the Copy because it
" is made common; and then it proves that being
" made common, it is not protected by the Law.

" Does

“ Does then a Transfer of Paper upon which it is
“ printed necessarily transfer the Copy more than the
“ Transfer of Paper upon which it is written.

“ The Author does not mean to make it common :
“ and if the Law says he ought to have the Copy *after*
“ Publication, it is then as it was *before* Publication, a
“ several property, easily protected, ascertained, and
“ secured.

“ The whole then must finally resolve into this
“ Question, whether it is agreeable to *natural Principles, moral Justice and Fitness*, to allow him the
“ Copy *after* Publication as well as *before*.

“ The general Consent of this Kingdom for Ages is
“ on the *affirmative* side : the *legislative* Authority has
“ taken it for granted, and interposed Penalties *to prevent it for a time*.

“ The single Opinion of such a Man as MILTON,
“ speaking, after much consideration, on the very
“ point, is stronger than the general inferences from
“ Writers far from thinking on the point, speaking of
“ an imaginary state of Nature prior to the Invention
“ of Letters.

“ The judicial Opinions of those great men who
“ granted or continued INJUNCTIONS in Cases *after*
“ Publication not within the Statute of Queen ANNE,
“ uncontradicted by any Book, Judgement, or Say-
“ ing, must weigh in a Question of Law; much
“ more

*That the Injunctions are Authorities of Weight, especially
in a Question turning on general Principles.*

" more in a Question where the Law results from general Principles. And these Injunctions may be regarded as equal to any final Decree.

" Whoever has attended the Court of Chancery knows, that if an Injunction in the Nature of an Injunction to stay *Waite*, is granted upon Motion, and continued after *Answer*, it is in vain to go to an Hearing: for such an Injunction never is granted upon Motion, unless the legal Property of the Plaintiff be *prima facie* made out; nor continued after hearing, unless it still remains clear, allowing all that the Defendant has said. In such a Case the Defendant is always advised either to *acquiesce* or *appeal*: for he can never make a better Defence than is stated upon his own Answer.

" That this Question was not sent from the Court of Chancery upon any Doubt of their's, but from a supposed Doubt in the Court of King's Bench, in the Case of *Tonson and Collins*; where the Court, suspecting Collusion, and that there would be no WRIT of ERROR, wished, in the first instance, to take the Opinion of all the Judges, by referring it to the Exchequer Chamber. There was Collusion, and the Cause proceeded no farther.

" But, independent of these additional reasons, if it is agreeable to natural Principles to allow the Copy after Publication, the Admission, which allows it on these Principles before Publication, warrants the saying that this is Common Law.

" There

Baskett and the
University of
Cambridge.
M. 32 G. II.
1753.

“ There is another Admission equally conclusive,
“ that by the *Common Law* the King’s Property in the
“ Copy continues after Publication.

“ The King has no property in the Art of Printing.
“ The ridiculous Conceit of *Atkins* was exploded at
“ the time.

“ *The King has no Authority to restrain the Press on
account of the subject Matter upon which the Author
writes, or his Manner of treating it.*

“ The King cannot by Law grant an exclusive
“ Privilege to print any Book which does not belong
“ to himself.

“ *Crown Copies* are, as in the Case of an Author,
“ civil Property: deduced, as in the Case of an Au-
“ thor, from the King’s Right of original Publica-
“ tion. The kind of property the same, the Remedy
“ the same.

“ There were no Questions before the *Restoration* as
“ to *Crown Copies*.

“ Upon every Patent which has been litigated since,
“ the Counsel for the Patentee have tortured their in-
“ vention to stand upon *Property*.

“ Upon *Rolle’s Abridgement* they argued from the
“ Year Books, which are there abridged, as compiled
“ at the King’s Expence, and therefore his Property.

“ Upon *Croke’s Reports*, that the King paid the
“ Judges who made the Decisions; and that therefore
“ the

“ the Decisions were his. The Judges of *Westminster Hall* thought they belonged to the Author; that is, “ to the Representative of the Author. But so far “ the Controversy turned upon Property.

“ In *Seymour's Case*, who printed *Gadbury's Almanack* without leave of the Stationers' Company, who “ had a Patent for the sole printing of Almanacs, “ *Pemberton* resorted to Property.

“ And in the Case before Lord *Cowper*, relative to “ this Claim of the Stationers' Company, an Injunction was granted till hearing. Nothing passed to “ favour the resting it on the Ground of Prerogative: “ Lord *Harcourt* afterwards heard the Cause, and sent “ it on a Case made for the Opinion of this Court. “ The Court, as far as it went, inclined against the “ Right of the Crown in Almanacs. But the Right, “ if any, was taken to depend upon Property.*

“ *Acts of Parliament* are the Work of the *Legislature*: the Publication of them has always belonged “ to the King as the *executive* part: the Art of Printing has only varied the Mode.

“ In a Case before Lord *Hardwicke*, the Plaintiffs “ had bought the *Sessions Paper* of the Lord Mayor. “ On Affidavit that the Lord Mayor had always appointed the Printers of that Paper, and that it was “ usual for the Lord Mayor to take a Sum of Money

* It has been since decided against the Stationers' Company.

“ for

" for it, Lord Hardwicke granted the Injunction on
" the foot of property.

" The Copy of the Hebrew Bible or of the Septua-
" gint does not belong to the King: but the Transla-
" tion he bought: therefore it has been concluded to
" be his property.

" If the Common Law be so in these Cases, it must
" also be so in the Case of an Author.

" That however the Statute might strike at the first
" View, it is impossible, if the Right ever did exist,
" to construe this into an *Abolition* of it: or, on the
" other hand, to take it as a *Declaration* that no such
" Right ever existed.

" The Preamble proceeds on the Ground of an an-
" tecendent Right: the Body of the Act provides a
" temporary security of that Right, accompanied with
" a saving, which leaves all Rights, in so far as that
" protection does not extend, in the state in which it
" found them.

" The Court of Chancery has uniformly given
" relief at large, without regard whether the Case fell
" within the Terms of the Act.

" His Lordship concluded, that after early, succe-
" sive, and solemn Consideration of the subject judi-
" cially before the Court in the two last Cases, he was
" confirmed in thinking the Court of Chancery did
" right in proceeding on the supposition of a subsisting
" Common Law Claim unaffected by the Statute:
" and

" and that consequently JUDGEMENT be for the
" PLAINTIFF.

" A Writ of Error was brought, but discontinued.

• Donaldson
and Becker.
Dom. Proc.
9 Febr. 1774.

" Afterwards, however, on a Decree of the Court
" of CHANCERY founded on this Judgement, it came
" by Appeal before the HOUSE OF LORDS.

" And on the following Questions it was ordered
" that the Judges be directed to deliver their opinion :

I.

" Whether at Common Law an Author of any Book or
" literary Composition had the sole Right of first printing
" and publishing the same for Sale, and might bring an
" Action against any person who printed, published, and
" sold the same without his Consent ?

II.

" If the Author had such Right originally, did the
" Law take it away upon his printing and publishing such
" Book or literary Composition ? And might any person
" afterward reprint and sell, for his own Benefit, such
" Book or literary Composition, against the Will of the
" Author ?

III.

" If such Action would have lain at Common Law, is
" it taken away by the Statute of 8th ANNE ? And is
" an Author, by the said Statute, precluded from every
" Remedy, except on the Foundation of the said Statute,
" and on the Terms and Conditions prescribed thereby ?

" It was farther ordered, that the Judges do deliver
" their Opinions on the following Questions :

" Whether

" Whether the Author of any literary Composition and IV.
" his Assigns had the SOLE Right of printing and publish-
" ing the same IN PERPETUITY by the Common Law?

" Whether this Right is any Way impeached, restrained, V.
" or taken away by the Statute 8th ANNE?

" The Judges differing in Opinion, the farther Con-
" sideration of the Cause was adjourned,* when, and
" on the following Days to which it was continued by
" Adjournment, they delivered their Opinions *seriatim*.

* To Tuesdays
13 Febr.
17 & 21 Febr.

" Mr. Baron EYRE, as to the sole Right in the ne-
" gative of the first Question, and Mr. Baron PERROT
" and Mr. Baron ADAMS, delivered their Opinions,

" That at Common Law the Author of any Book
" or literary Composition had the sole Right of first
" printing and publishing: but could not bring an
" Action against any person who printed, published,
" and sold the same, unless such Person obtained the
" Copy by Fraud or Violence.

" And they gave their Reasons.

" On the second Question Mr. Baron EYRE, Mr.
" Baron PERROT, Mr. Baron ADAMS, and the Lord
" Chief Justice DE GREY gave their Opinions in the
" AFFIRMATIVE, that on printing and publishing the
" Law did take away such Right, supposing it pre-
" viously to exist.

" On the third Question,

" Mr. Baron EYRE, Mr. Justice NARES, Mr. Ba-
" ron PERROT, and Mr. Justice GOULD, Mr. Baron
" ADAMS,

" ADAMS, and the Lord Chief Justice DE GREY, delivered their Opinions in the AFFIRMATIVE :

" That such Right is taken away by the Statute of Anne : and that an Author by the said Statute is precluded from every Remedy, except on the Foundation of such Statute.

" And to this all the last-mentioned Judges, except EYRE, concluded, (in the remaining Words of the Question) and on the Terms and Conditions prescribed thereby.

" But EYRE concluded his Opinion, instead of those Words, in the following Terms :—But that there may be a Remedy in Equity, upon the Foundation of the Statute, independent of the Terms and Conditions prescribed by the Statute, in respect of Penalties enacted thereby.

" And they gave their Reasons.

" On the fourth Question, Mr. Baron EYRE, Mr. Baron PERROT, Mr. Baron ADAMS, and the Chief Justice DE GREY, gave their Opinions in NEGATIVE of the Claim of Perpetuity.

" And on the fifth and last Question, in the AFFIRMATIVE, that (supposing it to exist) it is impeached, restrained, and taken away by the Statute 8th Anne, the four Judges last mentioned, with Mr. Justice NARES and GOULD, concurred.

" And they gave their Reasons.

" On

" On the contrary, Mr. Justice NARES, ASHHURST,
" BLACKSTONE, WILLES, ASTON, GOULD, the
" Lord Chief Baron, and the Lord Chief Justice of
" the COMMON PLEAS, gave their Opinion in the
" AFFIRMATIVE of the first Question, in the Terms in
" which it was proposed: (Mr. Justice BLACKSTONE
" being ill of the Gout, his Answers were read by
" Mr. Justice ASHHURST.)

" And they gave their Reasons.

" On the second Question, Mr. Justice NARES,
" ASHHURST, BLACKSTONE, WILLES, ASTON,
" GOULD, and the Lord CHIEF BARON of the Ex-
" chequer, gave their Opinions in the affirmative of
" the continuance of the Right after Publication,
" in the Terms of the Question.

" And they gave their Reasons.

" On the third Question, ASHHURST, BLACK-
" STONE, WILLES, ASTON, and the CHIEF BARON,
" gave their opinion,

" That such Action at Common Law is not taken
" away by the Statute of 8th Anne: and that an
" Author by the said Statute is not precluded of
" every Remedy, except on the Foundation of the
" said Statute, and on the Terms and Conditions pre-
" scribed thereby.

" And they gave their Reasons.

* I was so fortunate as to be present during the Argument in the House of Lords: which is well reported in the Gentleman's Magazine, 1774. C. L.

ULTIMATE RESULT, and Observations.

“ On the fourth Question, NARES, ASHHURST,
 “ BLACKSTONE, WILLES, ASTON, and the Lord
 “ Chief Baron, gave their opinion for the existence
 “ of a PERPETUITY in the COPY RIGHT at COM-
 “ MON LAW.

“ And they gave their reasons.

“ On the last Question, the Judges ASHHURST,
 “ BLACKSTONE, WILLES, ASTON, and the Lord Chief
 “ Baron, gave their opinions, supported by their Rea-
 “ sons, that this Right is not taken away, or any way
 “ impeached or restrained by the Statute of 8th of
 “ Anne.

“ So that on the first Question, of the eleven Judges,
 “ eight to three were for the Plaintiff; on the second,
 “ seven to four; on the third, five to six: on the
 “ fourth, seven to four: and on the fifth, five to six.

“ It was notorious that Lord MANSFIELD adhered
 “ to his opinion, and concurred therefore with the
 “ eight upon the first Question, the seven upon the
 “ second, the five upon the third, the seven upon the
 “ fourth, and the five upon the fifth: but agreeably
 “ to the delicacy which has prevailed against a PEER
 “ on an Appeal supporting his Judgement, he did not
 “ speak.

“ And the Lord CHANCELLOR seconding Lord
 “ CAMDEN’S Motion to reverse, the Decree was re-
 “ versed.

“ It did not seem inexpedient to give the Abstract
 “ of a Case, in which Characters the most illustrious
 “ for Learning and Abilities entertained opposite sen-
 “ timents, which was argued on the great Principles of
 “ Philosophy, the Law of Nature, and public Expe-
 “ dience,

"dience, on both sides, and which could only be dis-
"closed either by this equitable Action of *Trespass on
the Case*, or by a Bill in Equity for specific Relief.

"It is obvious that the Judgement of the House of
"LORDS does not affect the Claim of the Author to
"bring this Action of *TRESPASS on the CASE*, and
"to support it by *Evidence of Injury done to his Pro-
perty prior to Publication.*

TITLE VI.

General Observation.

"In closing this Article we may notice a general ^{2 Ventr. 151.}
"Difference" between Torts and Contracts: "inti-
"mated indeed in the former part of this Volume, but
"more connected with present practice, on the subject
"of this and the subsequent Divisions of the Work.
"It is this:"

When the Action is upon a Tort, one may be found guilty and the rest acquitted, "though" when the Action is upon a Contract all or none "must be sued as" Debtors according to the Truth of the Contract as it stands "charged in the Declaration;" for every *Trespass* is in its own Nature *joint and several*: for I may charge the Defendants under this Relation, as they aided and assisted one another, or as each by his own force committed the Injury: so that every *Trespass* is in the very Allegation *several* as well as *joint*; for it supposes a man to have used his own proper Force as well as to have assisted his Companion: and if a Man

Of NEUTRAL TORTS, *indifferently suable by Action or
by Indictment.*

be found guilty of one part of the charge, "namely, "that he *severally* and *solely* committed the *Trespass*" and not of the other "which charges him to have com-
mitted it in concurrence with other Defendants," yet the Injury "so far as he is concerned" is the same, and ought "equally" to be redressed: but a Contract may be joint only and not several; and when a Man declares of a joint Contract and proves a several one, he doth not prove the same Contract that he hath alledged in his Declaration.

S E C T I O N III.

"We have treated of Actions founded upon *Tort* "which are *properly civil*, or such as in the present "State of Society and of Government can fall rarely "within the Boundaries of a *criminal Prosecution*: we "have considered those which are *ordinarily civil*; "being most generally the Subject of private Suit, "though under circumstances not unfrequently capa-
ble of being prosecuted by Indictment; we are now "to speak briefly of the third Article under this Di-
vision, the *neutral Action*; or such as almost indiffer-
ently found a Claim to personal Compensation, or "to public Satisfaction.

"These, as in the order already specified, are,

- " 1. *ASSAULT*; with its nearly related *Torts*,
" *Battery*, and *false Imprisonment*.
- " 2. *Slander*.
- " 3. *Deceit*.

"An

C H A P T E R II.

Of ASSAULT.

“ An *Affault* is an *Attempt* to do some *Act* of corporal violence to another.

Comm. III.
c. 8. p. 120.
L.N.P. Ch. III.
p. 15. 4th Ed.
1785.
Ibid.

“ BATTERY is the unlawful striking or beating of another: comprehending even the smallest Degree of force unwarranted by Law.”

In Assault and Battery the Defendant ought to plead that it was his own Assault, “*on Assult demesne of the Plaintiff*” and cannot give it in Evidence under the general Issue: “and” if the Defendant pleads that it was “*bis own Assult*,” and proves that the Plaintiff bent his Fist at him, or that he laid his hand to his sword, this is Proof “to be left to the Jury” of an *Affault*: for where any man shews signs of Violence, it is a sufficient provocation to resist *in bis own Defence*; and the Defendant need not stay till a Blow is actually given before he provides for his own Defence; for then it may be too late to make any resistance.

“ If a Man wantonly do an Act by which another is hurt, as by pushing a *drunken* man, he shall answer in an Action of *Affault* and *Battery*: but if he intend doing a right Act, as to assist such drun-

L. N. P. Shove
and Lovejoy,
cor. Lee Ch. J.
Guildh. 1752.

“ken man, or to prevent him from going along the
“Street, and in so doing a hurt ensue, he will not be
“answerable.

“Where by a sudden Fright an Horse runs away
“with his Rider and hurts a Man, it is no Battery;
“and this may be given in *Evidence* under the *General
Issue*: unless perhaps if the Plaintiff were to prove
“the Horse had been used to run away with his Rider,
“for in such Case the Rider is not free from Blame.

4 Mo. 305.
Gibbons and
Pepper.

“If such Accident were occasioned by another Per-
“son’s whipping the Horse, such person would cer-
“tainly be liable in an Action on the Case.

Tr. to G. I.
Underwood and
Hewson
Str. 596.
Per Fortescus
and Raymond.

“And negligence will support this Action; where-
“fore it has been holden that it lay where the Plain-
“tiff standing by to see the Defendant uncock his Gun
“was accidentally wounded.

“CASE however it should seem, where circumstances
“of neglect are not distinctly apparent, is the more
“proper and certain remedy. For there, every damage
“shall be answered, which is not in the most just and
“strict sense inevitable.

“And if the Defendant be answerable in Trespass
“on the Case for avoidable omission, for wantonness
“or evident carelessness, much more where the Mis-
“chief happens in the doing of an unlawful Act natu-
“rally productive of it.

Boulter and
Clark at Abing-
don, 1747.
L. N. P. 16, 7. “And therefore, in an Action of *Assault* and *Bat-
tery*, the Counsel for the Defendant would have
“proved that the Plaintiff and the Defendant fought by
“Consent:

" *Consent*: and insisted that this was Evidence on the " *General Issue* in Bar of the Action, and urged a " Maxim * in support of this Argument. But *Parker Ch. B.* denied it, and said, the *fighting* being *unlawful*, the consent of the Plaintiff to fight (if proved) " would be no Bar to his Action, and that he was entitled to a Verdict for the Injury done him: and cited Cases in confirmation of this Doctrine; particularly that before Lord Chief Baron *Raymond*, where " in an Action for five Guineas on a BOXING MATCH, " the Judge held it an *illegal Consideration*, and the " Plaintiff was nonsuited.

Winch 49.
2 Lev. 174.

Webb and Bishop,
Glo. Lent Att.
before Ld. C. B.
Reynolds 1731.

" And another earlier Case, where it was said that " if a Man license another to beat him, such Licence " is *void*, because it is against the Peace: and therefore " upon the Plaintiff had a Verdict with 30*s.* Damages.

Comb. 218.
Matth. and
Olerton.

TITLE II.

Of Boxing Matches.

" And here it is difficult not to advert, with a mixture of various Sentiments by no means satisfactory to a mind which must necessarily observe, without prospect of suppressing, the Evil, on the revived Prevalence of BOXING MATCHES. With the personal Merits of the Combatants, this Treatise can have no concern; but the Practice itself is replete with pernicious tendencies. It raises a Combination of low and mischievous Passions: a Diversion founded on

* *Volenti non fit Injuria.*

" the Bruises and heightened by the discomfiture, the
 " temporary or permanent disabling, the maiming or
 " death of human beings, is not a very rational or very
 " manly Amusement. The Bets, the Ebriety, the
 " licentious Brutality naturally connected with such a
 " Spectacle, are adverse to every social Interest and
 " Principle. And to what End? Will any *Englishman*
 " say or think that such an Exercise is requisite to sup-
 " port the native Courage of *Englishmen*? If, for the
 " Preservation of Health, for the Encrease of Strength
 " and Activity, to be honourably and virtuously em-
 " ployed in the Defence of our Country, there is no
 " scarcity of exercise far better adapted to these pur-
 " poses. The more pleasing, wiser and nobler *gym-*
nastic Arts, swimming, running, leaping, hurling
 " the Bar, drawing the Bow. But the Vigilance of
 " the subordinate Magistrates, and their Fidelity to
 " the Laws would not surely be ill exerted in the ge-
 " neral suppression of these *Boxing Matches* by whom-
 " soever countenanced and attended, wheresoever they
 " arise (and the Abuse is already alarmingly extensive)
 " within their respective Jurisdictions. To the Man-
 " ners, the Peace, and good order of Society, a timely
 " and a necessary Service would thus be rendered:
 " otherwise the Evil must continue to spread till some
 " signal particular Event call forth the higher Powers
 " of the Law to its Coercion, and inform the hitherto
 " unconcerned Spectators of the extent of their own
 " legal hazard in abetting such practices: too late pro-
 " bably for the removal of innumerable bad conse-
 " quences on the temper of the Community, and per-

V. Post. 260.

* *Cum fessent ad Jura malis ridentem alienis.*

Battery to be justified must be not wholly disproportioned to
the Assault.

601

"haps even too late for the effectual restraint of this
wanton infringement of the public Policy which
might now be so easily suppressed.

TITLE III.

Not every Battery justified by every Assault.

" Nor where the original Assault is pleaded and pro-
ved, will every Assault justify every Battery: but
whether the Assault were proportionable to the Bat-
tery is matter of Evidence: and therefore, though
the Plaintiff set out a *Maibem* in his Declaration, the
Plea of son Assault demesne is the same, and he needs
not to plead that the Defendant would have *maimed*
him unless he had resisted with such force as to *maim*
the Defendant; but that must appear in Evidence,
by which it must be shewn that the Assault was in
some degree proportionable to the *Maibem*: and
therefore where the first Assault was given by tilting
the Form whereon the Defendant sat, whereby he
fell, and the *Maibem* was, that the Defendant bit
off the Plaintiff's Finger, HOLT Chief Justice
directed the Jury to give a Verdict for the De-
fendant.

" And of such as may be termed *constructive* Af-
faults, the legal Ascertainment depends on the cir-
cumstances in Evidence explanatory of the *Intent*:
thus," if a man clinch his Fist, or lay his hand on
his sword with this Declaration, that were it not
Affize time, he would tell the Plaintiff more of his
mind, this is no Assault: because he declares his
intent not to assault, "with such circumstances

Dance and
Lucy,
Salk. 246.
Cockcroft and
Smith, Salk.
642. S. C.
¹ Raym. 177.

² Keb. 545.

as

"as evidence his forbearing to revenge himself by force, a respect to Law and Order mastering his resentment;" and then his clenching his Fist and laying his hand upon his sword, cannot be reckoned any signs of Violence but only of Passion: for his bare "inchoate" Actions are not to be taken as signs of his mind, when he hath in "accompanying" words "and pursuant Action" expressed himself to the contrary. "This is just the *cæderem te nisi trascerer* of the Philosopher."

"And if an impulse or inchoate tendency of violence thus suppressed can not be denominated an Assault, much less shall a slight stroke, without passion, or design of injury, or disposition of incivility:" as if a man punch another with his Elbow in earnest discourse, this is no "Battery or" Assault: for "there is no" hurt "inflicted," nor is it a sign of intended Violence, and therefore does not call for Defence, nor is it necessary that it should be obviated by resistance, "or vindicated by the Laws as an insult."

TITLE IV.

Other Justifications beside son Assault demesne.

L. N. P.
4th Ed. 18, 9.
1 Hawk. P.C.
130.

"There are many other matters which may be pleaded in *Justification*, beside this of *son Assault demesne*: as if an Officer having a Warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; so if a Parent in a reasonable manner chastise his Child, a Master his Servant, or a Schoolmaster his Scholar, or a Gaoler his Prisoner: or if I beat one who wrongfully endeavours with Violence to dispossess me of Lands or Goods, or who assaults my Wife, Parent, Child, or Master.

"But

“ But though all these matters may be pleaded in ^{2 Raym. 62.}
“ Justification, yet they must be pleaded differently :
“ as for Example ; on *Assault* and *Battery* against
“ Husband and Wife for a Battery by the Wife, the
“ Defendant may plead that the Plaintiff was going
“ to wound her Husband, and that she *assultum fecit*
“ to defend him, and to prevent the Plaintiff from
“ beating him.

“ In the same manner a Servant may justify an Assault
“ in defence of his *Master* : but it has been said, not
“ on the other side ; for the Master may have an
“ Action on the *Loss of Service*, but the servant can
“ have no Action for the Assault on his Master. Yet
“ this Reason does not appear satisfactory : for, as the
“ great Magistrate who then presided expressed himself,
“ *it rests on the relation* ; which is reciprocal.

Vi. Leeward &
Bailee.
1 Salk. 407.

Vi. et 1 Hawk.
131.
3 Burn, 135, 6.
Tickel and
Read.

Williams and
Jones.
Str. 1049.
Green and
Goddard.
Salk. 641.

“ A man cannot justify a Battery in defence of his
“ possession without a request to depart, and then he
“ is to use no greater force than is required to amove
“ the Trespasser ; and this he may justify by a *molliter*
“ *manus imposuit* : so an Officer cannot justify more
“ than the Assault by virtue of an *Arrest*, without
“ shewing that the Plaintiff resisted or endeavoured to
“ rescue himself : except that by the way of *molliter*
“ *manus imposuit*, he may justify a *constructive* Battery,
“ by laying hands on him without violence.

“ But where *actual* force hath been used in breaking
“ into the Close of the Plaintiff, there he may justify
“ Battery : for it is but *repressing* violence by violence.”

Trespass of *Assault* and wounding, the Defendant
pleads *Not guilty* as to the *vi et armis* : and as to the
Assault, he makes Justification of *molliter manus im-*
posuit ;

posuit: the Justification shall be first tried: for possibly the using of force may be in his own Defence, and therefore just and lawful, and such a force as the Law does not oblige him to *defend*; * and therefore that ought to appear first on the Justification.

L.N.P. Ch.III.
p. 16, id. 25.
Short and
Lovejoy, coram
Lee, Ch. J.
G. Hall, 1752.
V. *supra*, 597.

" If the Defendant prove that the Plaintiff first lifted
" up his staff, and offered to strike him, this will justify
" a *Battery*; but *mere Words* will not justify a *Battery*,
" though they may explain the nature of an otherwise
" ambiguous *Act*.

Rex v. Warden
of the Fleet.
Ca. R. B. 339
at Bar.
L. N. P. 4th
Ed. 16.

" The Plaintiff cannot give in *Evidence* a Convic-
" tion at the suit of the King for the same *Battery*:
" and this on a general Rule expressed early in this
" Tract; that no Record of Conviction or Verdict
" shall be given in *Evidence* but whereof the Benefit
" may be mutual; namely, of which the Defendant
" as well as the Plaintiff might have availed himself
" by giving it in *Evidence*, in case it had made for
" him.

" Of Increase of Damages for a *Maihem* or griev-
" ous Wound on Inspection, we shall be hereafter to
" speak under the Article of *extraordinary Modes of*
" Trial.

* *Defend* is here used in the legal sense, to deny; *as, et defendit*
vim et injuriam: in the same sense Chaucer uses it:—

That ever God defended Marriage—
i. e. prohibited.

CHAPTER III.

Of FALSE IMPRISONMENT.

“ Every Restraint of a Man’s Liberty under the
“ Custody of another, without legal Authority, is
“ *false Imprisonment*, for which the Law gives an
“ Action: and this is commonly joined to *Assault* and
“ *Battery*; for every Imprisonment includes a Battery,
“ and every Battery, as we have seen, an Assault.

L. N. P.
Ch. IV.

Co. Litt. 253a

TITLE II.

Of Justification under legal Warrant.

In Action for *false Imprisonment*, on *Not guilty* the ^{a Keb. 545.} Defendant gives in *Evidence* that he took the Plaintiff by virtue of a Warrant from a Justice of the Peace: and this is within the Statute, though the Defendant be no Officer: for it says, any others that do any thing by virtue of the Command of the Justice of Peace.

If the Defendant be no Officer, he is not bound to execute his Warrant: because the Justices have no power to compel an Execution but on their own Officers, who are “ appointed” and liable to execute the Business of Justice: but the Defendant may justify the doing “ of” the Thing to which the Justice has Commission, as Servant to the Justice of Peace; for the Justice may execute his Warrants by his own servants if he please. A Constable is “ indeed” not compellable to execute a Warrant out of his own Liberty, because he is only appointed by the Law as an Officer to keep the Peace within that District; but he

may

WARRANT, where and whom it shall justify against an
Action of false Imprisonment.

may execute any Warrant where the Justice hath Commission, as any private man may do, " being voluntarily a *special Constable* for that particular purpose.

24. G. II. c. 44.
IV Comm. 291.

" And now if the Justice exceed his Jurisdiction, a Warrant, if regularly framed in point of form, will, if there be any colour of Jurisdiction, indemnify at all Events the Officer who acts under it ministerially.

Ibid.
V. L. N. P.
4th Ed. 24.

" For no Action can be brought against a Constable or other Officer, or person acting under Order of a Justice, for any thing done in obedience to the Warrant, until demand made of the Perusal and Copy of such Warrant, and Refusal for the space of six days: and in case the Warrant be shewn, and a Copy taken, and an Action afterward brought against the Constable without making the Justice a Defendant, the Jury shall, on production of the Warrant, find a Verdict for the Defendant, notwithstanding any Defect of Jurisdiction in the Justice: and if such Action be brought jointly against the Justice and him, upon producing the Warrant, the Jury shall find for him: and if they find against the Justice, the Plaintiff shall recover the Costs he is to pay to such Defendant against the Justice: with a Proviso, that if the Judge certify the Injury was wilfully and maliciously committed, the Plaintiff shall be intitled to double Costs.

3 Burr. Mansf.
1766, &c.

" The Officer must prove that he acted in obedience to the Warrant: and where the Justice cannot be liable,

" liable, the Officer is not within the Protection of
" the Act. For the Rule extends only to Actions of
" *Tort*, and therefore on a Conviction quashed, where
" the Officer was sued for the Money levied, by an
" Action for Money had and received, it was held
" that a Demand of a Copy of the Warrant was not
" necessary.

TITLE III.

GENERAL WARRANTS,

" The Officer cannot justify an Imprisonment for
" Non-payment of Taxes, under the general printed
" Warrant which the Collectors have, signed by two
" Justices; but he must shew a special *Warrant*.

Feltham v.
Terry
E. 13 G. III.
B. R.
1 Raym. 740.

" With regard to a *general Warrant* to apprehend all
" persons *suspected*, without naming them, it is clearly
" *illegal* and *void* for uncertainty: for it is the duty of
" the Magistrate, and ought not to be left to the Officer
" to judge of the ground of suspicion.

Comm. IV.
291.
1 H. P. C. 580.
2 Hawk. P. C.
82.

" So if a Warrant to apprehend *all* persons *guilty*
" of a crime therein specified, without naming or
" describing them in particular: as thus, the Authors,
" Printers, and Publishers of a scandalous and sedi-
" tious Libel, the Paper itself so charged being speci-
" fied in the Warrant.

" And of this Sir *William Blackstone* remarks, that a
" practice had prevailed ever since the Restoration of
" issuing from the *Secretaries' Office* general Warrants
" of this kind: grounded on some Clauses in the Acts
" for regulating the Press. That when in 1694 these Acts
" expired, the practice had inadvertently continued in
" every reign, and under every administration, (ex-
" cept the last four Years of Queen ANNE) down to
" 1763.

" At

Money v.
Leach.
Tr. 5 G. III.
3 Burr. Mansf.
1742.

"At that Period, in the ever memorable Case of
"Mr. Wilkes, (whose Courage and Firmness in the
"great Contest fixed the personal Liberty of Englishmen,
"in this respect perpetual, on a Basis not to be sub-
"verted by the Arm of arbitrary Power, under pre-
"tence of Law) the Validity of such a Warrant was
"solemnly investigated: and by the whole Court of
"King's Bench the Warrant was adjudged to be void.
"And Mr. Justice YATES declared it was so clearly
"illegal, that a continued series of Precedents, could
"they have been adduced, originating as far back as
"FROM THE FOUNDATION OF ROME,* could not
"have rendered it other than merely void.

JOURN.
22 Apr. 1766.

"And by a Vote of the HOUSE OF COMMONS the
"issuing of such *General Warrants* is declared VOID.

"It is in Fact *no* Warrant at all, and therefore
"will not justify the Officer who acts under it.

TITLE IV.

Distinction farther noticed between Trespass Vi et Armis and Case.

"This Action of *false Imprisonment* being in re-
"ality an Action of *Trespass vi et armis*, though
"separated from the *innominate Actions* of the kind,
"as well for its specific importance as on account
"of its being of a convertible Nature, and equally
"open to *Indictment* at the option of the aggrieved
"party, we are now to recollect a distinction between
"a mere *Action* of *Trespass* on the *Case*, and an *Action*
"of *TRESPASS*.

* Perhaps the Expression of the venerable Judge was, AB URBE
CONDITA, meaning analogically, from the Rise of the British Constitution.

"And

" And accordingly, where the Declaration stated a
" dispute between the Plaintiff and one *Thomas Davies*,
" relative to the property of an ewe lamb, and that
" *Davies*, in order that the property might be ascer-
" tained in an expeditious manner, applied to the De-
" fendant, a *Justice of the Peace*, and having related all
" the circumstances, requested him to examine Wit-
" nessess and determine the dispute: but that the De-
" fendant, well knowing the Premises, and contriving
" and maliciously intending to hurt the Plaintiff, and to
" cause him to be reputed a thief, and to subject him
" to the pains and penalties appointed against robbers
" and felons, and to put him to great charge, on the
" 14th of *July*, 1786, falsely, maliciously, &c. and
" without any charge or accusation made to him the
" Defendant against the Plaintiff, and without sum-
" moning him to appear, or hearing him in his De-
" fence, and without any reasonable or probable cause
" whatever, and against his duty as Justice of the
" Peace, by his Warrant commanded the Constables
" to deliver into Custody the Body of the Plaintiff,
" charged on the Oath of several *substantial Witnesses*
" before him, the Defendant, of feloniously taking,
" keeping, and detaining a sheep and lamb, the pro-
" perty of *Thomas Davies*, and also sheering the same
" in order that they should not be known, and *impri-*
" *sioned* him in the common Gaol on the said charge,
" from the 14th of *July*, 1786, to the 14th of *Sep-*
" *tember* then next following.

Morgan v.
Hughes.
T. R. II. 225.
Hil. 28 G. III.

" To this Declaration there was a *Demurrer*, assigning, among other special Causes, that the supposed Imprisonment in the Declaration mentioned was, if committed at all by the Defendant, a *direct Trespass and Injury* to the person of the Plaintiff, and a false Imprisonment of the Plaintiff with *force and arms*, and against the peace of the King; and ought to have been accordingly prosecuted by the Plaintiff, and not on Action of *Trespass on the Case*.

" And the Court held this Cause of Demurrer to be good: for that where the immediate Act of *Imprisonment* is from the Defendant, the Action must be *Trespass (vi et armis)* and *Trespass only*: but where the Act of Imprisonment by one is consequent on information from another, the *Action on the Case* is the proper remedy. That the Record states the Warrant was illegally granted, without proof and without accusation: the Constable is not liable; being bound to execute the Warrant of a Justice having competent Jurisdiction; and therefore, if it were not an Imprisonment by the Defendant, it was not Imprisonment by any person. But where a person is committed to prison by the Warrant of a Justice without any Accusation, some person is guilty of false Imprisonment; and it must be the Imprisonment of the Justice, who is the immediate and not the remote Cause of it.

TITLE V.

Sending a Person prisoner beyond Sea.

3rd Car. II.
c. 2.

" There is one particular species of *false Imprisonment*, which subjects the person guilty of it to one of the severest of our legal Punishments; this is, the " sending

" sending of any subject of this realm a *prisoner* into
" parts beyond the sea, and thus removing him from
" the protective arm of the Laws, and encompassing
" him with the horrors of hopeless Captivity. This
" is punished with the incapacity of holding any
" Office, and exclusion from the Benefit of Pardon
" from the Crown, and is subjected to the pains and
" penalties of a *premunire*: those pains and penalties
" are indeed great: for the Defendant upon whom
" they attach is out of the King's protection, and
" consequently can maintain no suit: his lands, tene-
" ments, goods, and chattels, are forfeited to the
" Crown; and he shall be imprisoned during the
" pleasure of the King: which, if it mean till the King
" pardon, must be, by the Statute of *Habeas Corpus*,
" in the present instance, during the life of the Of-
" fender.

" Thus is the tremendous punishment devised against
" the Adherents to the *civil Usurpation* of the *Papacy*,
" applied to the attempt of depriving any individual
" of his Country, and the protection of her Laws.

" The Crime is one of the greatest possible to be
" committed against Society: and if utter confiscation
" of all property (which extends the stroke to the
" innocent family of the delinquent); if irredeemable
" bondage (which exhibits the total privation of Li-
" berty as legally possible) ought in any instance to be
" inflicted, it is impossible to suggest a Case more

“ deserving of such a sentence. But the Voice of
 “ Nature* and the Voice of civil *Wisdom* can be
 “ never really at variance. There are certain limits of
 “ Punishment which the Eye of Justice discerns with
 “ unperturbed Clearness in every possible instance.
 “ And in a Constitution which has *Liberty* for its End,
 “ it merits the most serious regard, whether the per-
 “ petual destitution of this sacred right should be
 “ deemed competent to be inflicted by the Society on
 “ any Criminal; and whether it be not in every respect
 “ better,—for the individual,—for the Community,—
 “ that he who cannot live consistently with the Life
 “ and Freedom of others, unless in perpetual Custody,
 “ should die by the sentence of the Law, rather than
 “ live an exception to all the Rights annexed to the
 “ Citizen and inherent in the Man. Ought not the
 “ Constitution of such a Country to pronounce to all;—
 “ by rare and extreme necessity, any of you may be
 “ deprived of Life under the Authority of the Laws,
 “ and by the Judgement of your fellow Citizens; but
 “ of Liberty, without hope of Restitution, never.

* *Nunquam aliud Natura aliud Sapientia dicit.*

CHAPTER IV.

On SLANDER.

“ SLANDER is defaming a Man so as may endanger
“ or damage him in his Life, Liberty, Reputation,
“ or Profit.

Comm. III.
Ch. 8. § 5.
L. N. P. B. L.
C. I.

“ It may be by either speaking, writing, or other
“ Signs.

TITLE II.

Construction from the Words :—of impossible Charges.

“ There is one general Rule respecting the Construction of Words charged as *defamatory*; they shall be taken in their natural and obvious sense, resulting from the proper import of the whole considered together.

“ Thus, where the Defendant said to the Plaintiff, *I know you very well; how did your Husband die?* Ward v. Reynold. Paesch. 12 A.

“ The Plaintiff answered, *as you may, if it please GOD*: the Defendant replied, *No; he died of a Wound you gave him.* On Motion in Arrest of Judgement, the Court held the Words actionable: for they are, in the whole frame of them, spoken by way of Impputation. And *Parker*, Chief Justice, said, that it was very odd that a Court should be trying, after Verdict, whether there may not be a possible Case, in which Words spoken by way of scandal might be innocently said: whereas if that were in truth the Case, the Defendant might have justified.

“ And the Rule of Construction here noticed being founded on universal Principles of clear and conclusive Reasoning, pervades the whole of civil and criminal Evidence.

“ The charging of another with a Crime of which he cannot by any possibility be guilty (as killing a man who is then living) is not actionable on the general ground of Slander, because the Plaintiff can be in no legal Jeopardy by such charge: but such matter must be pleaded specially, and cannot be given in Evidence in support of the general Issue *not guilty*.

TITLE III.

Variance.

s R. Abs.

“ Generally on Words *spoken*, the Plaintiff may prove the substance of the Words, and it will be sufficient if there appear no material difference.

*Avarillo v.
Rogers.
Guildh. Tr.
1773, before
Lord Mansfield.*

“ Where the Words are laid in the third person, as *he deserves to be hanged for a Note he forged on A.* and the Words proved are in the second person, *you deserve*, this Evidence will not support the Declaration: for there is a great difference between Words spoken in a passion to a Man’s face, and Words uttered deliberately behind his back.

TITLE IV.

General Slander.

*Guest and
Loyd.*

*Geare v.
Britton, per
Lee, Ch. J.
1746.*

“ Words of general Slander, importing a rash and passionate temper in the Speaker of them, will not sustain an Action, unless special Damage be proved, as Loss of Marriage, of Employment, of customers; and whether the Words be in themselves actionable, or not, the Plaintiff shall not prove a special Damage, which he has not laid in the Declaration.

“ Where

TITLE V.

Words spoken for justifiable Cause.

“ Where Words are spoken in Confidence, and for
“ the security of a person really concerned in the in-
“ formation they are meant to convey, and without
“ malice, no Action lies: as, *be cannot stand it long*;
“ *be will be a Bankrupt soon*; special Damage was laid
“ in the Declaration, that in consequence of these
“ Words, one *Lane* refused to trust the Plaintiff for
“ an horse: *Lane* was the only Witness called for the
“ Plaintiff; and it appearing on his Evidence, that
“ the Words were not spoken maliciously, but in con-
“ fidence and friendship to *Lane*, and for a Warning
“ to him, and that by reason of such advice, he did
“ not trust the Plaintiff with the horse, *PRATT*,
“ Chief Justice, directed the Jury, that, although
“ the Words were otherwise actionable, yet if they
“ should be of opinion that they were not spoken out
“ of malice, but in the manner before mentioned,
“ they ought to find the Defendant *Not guilty*: and
they did so accordingly.

Hervet v. Dow-
son. C. B.
S. aft. Tr.
5 G. III.
L. N. P. S.
4 Ed.

“ And on the same Principles, where a servant
“ brought an Action against her former Mistress, for
“ saying to a Lady who inquired after the Plaintiff’s
“ Character, that she was saucy and impertinent, and
“ often lay out of her own Bed; but that she was a
“ clean girl, and could do her work well: the Plain-
“ tiff proved she was by this character prevented from
“ getting a place: yet by Lord *Mansfield*, this is not
“ to be considered as an Action in the common Way
“ for Defamation by Words: that the *Gift* of it must
“ be *Malice*, which is here not implied from the oc-

Edmonson v.
Stevenson et
Ux. S. at West-
minster aft. E.
6 G. III. B. R.
L. N. P. ut
supra.

“ casion of speaking the Words, but must be expressly proved. That it was a confidential Declaration, and ought not to have been disclosed. But if without Ground, and purely to defame, a false Character should be given, this would be a Foundation for an Action.

TITLE VI.

Words spoken of Persons in official Situation.

L. N. P. 4.

“ It has been held that in Offices of *Profit*, Words that import Defect either of Understanding, Ability, or Integrity, are actionable: but that in Offices of *Credit*, Words that impute only Want of Ability are not actionable; for that a man cannot be held responsible for Want of Ability as for Want of Honesty.

How v. Priore.
Salk. 695.

“ But that in either Case, charging him with inclinations and principles which shew him unfit, is sufficient, without charging him with any Acts: as to say of a Member of Parliament, *He is a Jacobite, and is for bringing in the Pretender.*

Comm. III.
124.
Ld. Raym.
1369.

“ Words concerning Persons in a public Office, which impute qualities or defects naturally tending to the disparagement of their persons and office, are held more highly injurious than when uttered of a private person: and it seems that Words of general Defamation spoken concerning such may be actionable; though of persons merely private, they would not.

TITLE VII.

“ There is a species of compound Action very rarely brought in the present Age, which is *scandalum magnatum*: this in so far has the property of a “ civil

“ civil Action, as it gives *Damages* to the party injured, L.N.P. 3, 4:
 “ besides subjecting the Offender to *Imprisonment* for
 “ the public Wrong.

“ It is needless at this time to observe on the Idea,
 “ that under a Prosecution of this kind words should
 “ be taken in the *worst* sense; as if the Honour of
 “ persons in high rank, or the ends of public Justice,
 “ were served by supposing words in reference to such
 “ persons to have a scandalous import, contrary to
 “ their natural and obvious sense.

¹ Ventr. 60.
Mod. 55.

² Mod. 159.
Bradley and
Messon.
M. 10 G. II.

“ And on this Action of *scandalum magnatum*, or in
 “ an Action upon a *Libel*, the Defendant may *justify*
 “ as in a common Action of Slander: but in none of
 “ these can he properly give the Truth of the Words
 “ in *Evidence* on the general Issue; otherwise than in
 “ Mitigation of Damages at most; and that too
 “ under many restrictions: indeed it seems that he
 “ will be now obliged to justify specially in all Cases Str. 1200.
 “ of Slander, where he relies upon the Truth of the
 “ Charge.

⁴ Co. 13.
² Mod. 166.
¹ Saund. 120.
Burr. Mansf.
807.

TITLE VIII.

Hearsay, no Justification.

“ On an Action of *Slander*, the Defendant may
 “ either justify, or, if he think proper, give in *Evi-*
 “ *dence*, under the general Issue, that the Words were
 “ spoken by him as *Counsel*, and are relevant to the
 “ Cause; or that he spoke them out of concern, in a
 “ friendly manner: but he shall not, in making idle
 “ Report to the prejudice of any, justify that he heard
 “ it of another.

Guildh. 1751,
cor. Lxx, Ch.J.

“ With

TITLE IX.

Petition to a Court having Jurisdiction.

Lake v. King.
2 Saund, 132.

“ With regard to written scandal, if an Action be brought for Words written or printed, and it appear that they were contained in a *Petition* to Parliament, this for Matter pertinent to the Petition shall exempt Words which otherwise would be highly actionable.

Oswod v. Buckley. Cam. Stell.

“ It is otherwise if in a Petition to an inferior Court, charges are introduced of matters not cognizable in that Court.

TITLE X.

General Justification will not serve.

Panson v.
Stuart.
T. R. 748.
E. 27 G. III.

“ With respect to the justifying of the Truth of a Charge in an Action for *Slander*, spoken or written, the following Case is material :

“ The Plaintiff brought his Action in the Common Pleas for a *Libel*, printed in the *Morning Post*, which was stated in the Declaration, with *Innuendoes* to this effect :

“ The public cannot be too frequently cautioned against notorious swindlers and common informers. A nest of these hornets, (meaning the notorious swindlers and common informers) who live by sucking the honey produced by industrious bees, have lately been discovered dividing their spoil at their nest in the corner of the King's Road, (meaning the dwelling-house of the Plaintiff) from whence (meaning the said dwelling-house of the Plaintiff) they (meaning the said notorious swindlers, &c.) have heretofore (meaning before the time of printing and publishing the said Libel) issued, to sting the unsuspecting (meaning to insinuate and be understood thereby

“ thereby that the said Plaintiff was illegally, fraudu-
“ lently, and dishonestly connected with divers swind-
“ lers and common informers, and shared with them
“ the spoil and plunder by them from other persons
“ unlawfully, &c. and by swindling gotten and ob-
“ tained). The head of the gang (meaning thereby
“ the Plaintiff, and also that the Plaintiff was the
“ principal and head of the gang of the said swindlers
“ and common informers) possesses in a strong degree
“ the attribute of a gentleman called the Devil, who
“ first seduces, then stimulates, and at last deceives,
“ and leaves his dupes to punishment, &c.

“ The Defendant pleaded, that the Plaintiff had
“ been illegally, fraudulently, and dishonestly connected
“ with, and was one of, a gang of swindlers and com-
“ mon informers; and had also been guilty of de-
“ ceiving and defrauding divers persons with whom
“ he had had dealings and transactions: wherefore
“ he printed and published, &c.

“ On *special Demurrer* to this Plea the Plaintiff
“ assigned for cause, that the Defendant hath not set
“ forth or shewn by his plea in what manner the Plain-
“ tiff was illegally, fraudulently, and dishonestly con-
“ cerned, and connected with, and was one of, a
“ gang of swindlers and informers; nor shewn with
“ whom in particular he was so connected, nor whom
“ in particular he has so deceived; or in what manner,
“ or in what particular dealings and transactions:
“ concluding, that the Defendant hath set forth the
“ charges in that plea contained in so uncertain a
“ manner,

"manner, that the Plaintiff cannot know what particular Facts the Defendant will attempt to establish by Evidence on the Trial, and therefore cannot be prepared to disprove or answer the same.

"The COURT were of opinion, that this Plea was clearly bad, as pleaded by the Defendant, for its generality. When the Defendant took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge; then he ought to state those facts specifically, to give the Plaintiff an opportunity of denying them; for the Plaintiff cannot come to the Trial prepared to justify his whole life. That he should be at liberty to charge the Plaintiff with swindling, without shewing any instances of it, is contrary to every rule of pleading. If this Plea were to be allowed, it would be to suffer any person to libel another more on the Records of the Court than he could do in a public Newspaper. He could not prove the Justification, as he has pleaded it, by general Evidence; but he has no Justification, unless he can prove the special instances; and knowing them, he ought to put them on the Record, that the Plaintiff may be prepared to answer them.

"And on these Reasons the Judgement of the Common Pleas for the Defendant was reversed.

TITLE XI.

Bill of Exchange drawn libellously.

"A Note payable to A. B. Villain, is good Evidence in proof of a Libel.

LIMI-

T I T E E X I I .

L I M I T A T I O N o f T I M E .

“ The Time for Prosecution, as well in this Action
 “ for *Defamation* as in the preceding, of *Assault*, and
 “ *Battery*, is limited: but this must be pleaded. With
 “ regard to *Assault* and *Battery*, the Limitation is
 “ four years; with regard to *Slander*, two.

“ But in respect of *Slander*, this extends not to
 “ *Scandalum Magnum*, nor to Cases where the spe-
 “ cial Damage is the *Gift* of the Action; yet where
 “ the Words are in themselves actionable, special
 “ Damage will not take them out of the Statute.

C H A P T E R V .

O f M A L I C I O U S P R O S E C U T I O N .

“ There is yet an higher kind of *Slander*, under
 “ colour and pretence of Law: for which a special
 “ remedy is provided, by Action for *malicious Prosecu-*
 “ *cution*.

“ There is a great Difference between a *civil* suit
 “ and an *Indictment*. It is not actionable to bring an
 “ *Action*, though without ground: for it is a Claim
 “ of Right, and the Plaintiff finds pledges to pro-
 “ secute, and is ameritable for his false Claim: and
 “ although these two restrictions are now in effect *ideal*,
 “ yet there is a substantial one, which is, that he shall
 “ answer in Costs.

“ An Action will lie for suing the Plaintiff in the
 “ *Spiritual Court* WITHOUT CAUSE: and causing him
 “ to be excommunicated *falsely*, fraudulently, and ma-
 “ liciously,

21 J. I. c. 16.
 L. N. P. 22.
 4 Ed.

Litt. Rep. 342.
 1 Sid. 95.
 Saunders and
 Edwards.
 L. N. P. 11.

L. N. P. Ch. II.
 Saville and
 Roberts.
 1 Salk. 14.

Of malicious Prosecution.—Evidence to prove a malicious Indictment.

" *liciously, WITHOUT GIVING HIM NOTICE; whereby he was put to great Costs.*

H. MSS. III.
Saunders v.
Edwards.
M. 14 Car. II.
B. R.
Tr. per P. 180.
S. C.
3 Keb. 389.
Show. 282.
Hayens v.
Rogers.
Law of Evi-
dence, * 179.

" *On a Declaration for charging the Plaintiff with the Crime of Felony, the Plaintiff cannot give in Evidence Words only, but Acts, as arresting, charging the Constable with him, or convening him before a Justice of the Peace for Felony.*

TITLE II.

Evidence to prove a malicious Indictment.

L. N. P. 33, 4.
4 Ed.

" *In support of this Action, the Plaintiff, where he charges that he was thereof duly acquitted, should produce and prove a Copy of the Indictment and Acquittal on Record, and the substance of the Evidence given on the Indictment, and the Charges of the Acquittal.*

" *He may also find it expedient to prove other circumstances collaterally, shewing that the Prosecution was malicious and without probable Cause: and he may give in Evidence the state of responsibility of the Defendant, with regard to Damages.*

H. MSS. III.
L. N. P. 14.

" *The Defendant's Name on the Back of the Bill is sufficient Evidence of his having been sworn to the Bill; and indeed the best Evidence: though the Indorsement of Witnesses be no part of the Record; and you may prove that he was sworn, without having his Name to the Bill:*

* Law of Evidence, wherever thus cited, refers to a Work of that Title published (2d Ed.) 1735.

" But

“ But you must prove by other Evidence that he was
“ the Prosecutor ; for his Name being on the Bill is
“ no proof of this.

H. MSS. qua
supra.
L. of Ev. 179,
80.

“ In support of a Declaration, charging a *malicious Prosecution*, and that thereof the Plaintiff was
“ *duly acquitted*, it seemeth a *N. prosequi* entered by
“ the Attorney General is not sufficient. HOLT,
“ Chief Justice, argued, this is so far from discharg-
“ ing the party from the Offence, that it did not dis-
“ charge that very Indictment, but that new Process
“ might issue upon it. That if he had pleaded *Not Guilty*, and the Attorney General had confessed it,
“ that would have done. The other Judges appear to
“ have held that it was a Discharge from that Indict-
“ ment : but that it did not operate as an Acquittal of
“ the Crime, and that consequently the Evidence did
“ not maintain the Declaration.

H. MSS. III.
Goddard and
Smith.
Salk. 21. &
763.
M. 3 A. B. R.
6 Mod. 261.
S. C.

“ But although, if the Defendant lay an *Acquittal*,
“ he must prove it, yet it is not necessary that he should
“ lay one in order to maintain this Action : for where
“ a Man is falsely and maliciously indicted of a Crime
“ which hurts his Fame, endangers his Liberty, or puts
“ him to expence in defending, an Action lies ; for the
“ Mischief is in so far effected, though the Indictment
“ be insufficient, or an *ignoramus* be found. And in a
“ Case where the Perjury was ill assigned on the Indict-
“ ment for which the Action for a malicious Prosecu-
“ tion was grounded, the whole Court dismissed the
“ Objection of the supposed incompetency of this
“ Action, because the party could not legally have

L. N. P. 13.

2 Str. 977, 8.
Jones v. Gwyn.
Gilb. R. 185.
Cro. Ja. 490.
T. 16 Ja. I.
Chambers v.
Robinson.
Hil. 12 Geo. L.
Str. 691.

Gib. 220. S.O. " been convicted : observing, that a bad Indictment
 " answers the purposes of Malice by putting the
 " party to expence, and exposing him, though it
 " serves no purpose of Justice in bringing the party to
 " punishment, if guilty.

" If the Action for a *malicious Prosecution* be brought
 " against several, and only *one* be found guilty, it is
 " sufficient : for there is a great Difference between
 " this Action on the Case in the *Nature of a Conspiracy*, and a *Writ of Conspiracy* at Common Law :
 " for in this Case the Damage sustained is the Ground
 " of the Action.

TITLE III.

The Plaintiff in this Action must generally prove the Want of probable Cause.

" Though an Action lie, to prevent uncompensated
 " Wrong to Innocence, for a malicious Prosecution,
 " yet it is not favoured, lest the Course of Justice
 " should be impeded. And therefore if an Indict-
 " ment be found by the Grand Jury, this is *prima facie* a just presumption of *probable Cause*, which
 " the Defendant, on a charge of having maliciously
 " prosecuted, is consequently not called to prove, but
 " the Plaintiff must disprove.

Golding v.
Crowle.
M. 25 G. II.

" And it shall lie upon the Plaintiff to prove
 " Malice : and even then, if he do prove this, yet if
 " the Defendant shew a *probable Cause*, he shall have a
 " Verdict.

Cobb and Car.
1746.

" And when the Defendant finds it necessary or
 " expedient to prove that there was *probable Cause*,
 " Evidence given by the Defendant in support of the
 " Indictment is good.

" Where

*Parrol v. Fish-
wick. Lond. Tr.
1772.*

“Where the Facts upon which the stress of the
“Question turns lie within the knowledge of the De-
“fendant himself, there it is incumbent on him to
“prove that they constitute a probable Cause, other-
“wise the Plaintiff shall recover, without direct proof
“of Malice.

TITLE IV.

What Evidence admissible in this Instance ex Necessitate Rei.

“When the Action is for a malicious Prosecution
“for *Felony*, the first part of the Defence must be to
“prove the Felony committed: and therefore, if no
“person were by at the time of the supposed Felony
“but the Wife of the Defendant or the Defendant
“himself, their Oath at the Trial of the Indictment
“may be given in Evidence to prove the Felony: and
“accordingly HOLT, Chief Justice, in such Case al-
“lowed the Evidence of her Oath, which she made
“at the Trial, to be given to prove the Felony com-
“mitted: for otherwise one that should be robbed
“would be under an intolerable mischief: since if he
“prosecuted for such robbery, and the party should be
“at any rate acquitted, the Prosecutor would be liable
“to an Action for a *malicious Prosecution* without the
“possibility of making a good Defence.

*6 Mod. 236.
Johnson & Ux.
v. Browning.
H. MSS. III.
L. of Ev. 180.*

CHAPTER VI.

Of Deceit.

^{2 Danv. 543, 4,}
^{5.}
^{L. N. P. B. II.}
^{Ch. I.}
^{Comm. III.}
^{c. 9.}
^{Fitz. N. B.}
^{Ed. 1730,}
^{p. 217.}

" This appears to be analogous to the *Aetio doli mali* of the *Roman Law*. In its strictest sense indeed it is more limited: and lies where one man does a thing in the name of another whereby that other is damned or prejudiced. As where one brings an Action in the Name of another without his consent, and suffers a Nonsuit, thereby charging the party in whose name the Action is brought with Costs; or if he suffer a fraudulent Recovery. And in such Cases the Writ of *Deceit* is the mean to restore the party to the Lands, or the Profits, or the Debt, or to give him compensation in Damages, according to the nature of the Injury.

^{Fitz. N. B.}
^{224.}

" So for a *special Warranty* on the Sale of Goods.

^{N. B. 217.}

" This was regarded as an equitable Writ: which should not abate for Form, if it were good in Substance.

^{Comm. III.}
^{265.}

" But it could not be sued by Attorney: and on the whole, an *Action on the Case* in the Nature of *Deceit* being more convenient and comprehensive, has prevailed in its stead in most Cases of personal Wrongs.

" This

TITLE II.

ACTION ON THE CASE in the Nature of Writ of
DECEIT.

“ This lies where a person by false Affirmation in
“ Words, or otherwise by equivalent Actions, imposes
“ upon another to his damage who has placed a
“ reasonable Confidence in him. As if a Man in
“ possession of a horse or a lottery ticket sell it to
“ another as his own: for in personal Chattels Pos-
“ session is a Colour of Title; so as to be a reasonable
“ inducement for the belief of Ownership, while
“ nothing to the contrary appeareth.

L. N. P. 4th
Ed. 30.

Medina and
Stoughton.
Tr. 12 W. III,
B. R.
Salk. 210.

“ As Fraud is the *Gift* of this Action, the Plaintiff
“ must shew some Ground to prove that the Defen-
“ dant knew the Goods were not at his Disposal.

“ Where the Vendor affirms the Goods are the pro-
“ perty of his Friend (a Stranger to the Buyer) and
“ that he has Authority to sell them; if the Plaintiff
“ prove them the Goods of another, this is *prima facie*
“ sufficient; and he needs not to prove that the
“ Defendant knew them to be so; for he has now
“ established a strong presumption of Fact against the
“ Defence of their having been sold by direction of
“ the Defendant’s Friend: and after this proof, if
“ the Defendant would excuse himself, he must shew
“ that he himself was deceived by a supposed Owner.

2 Danv. 176.
pl. 7.

" Where the Seller is out of possession, the Action
" must be grounded on an express Warranty.

Sid. 146.
Tr. 25 Car. II.
Leakins v.
Cliffel.
Risney and
Selby.
Salk. 211. S. P.
Raym. 1118.
S. C.

" If the Seller affirm the Rent of an House to be
" more than it really is, whereby the purchaser is
" induced to give more than it is worth, an Action
" will lie for the Deceit, for the Value of the Rent is
" a matter which lies in the private knowledge of the
" Landlord and Tenant, and must be the same to all
" as a measure of certain profit. But if the Seller
" had affirmed only that *A. B.* would have given so
" much for it, whereas *A. B.* had never offered so to
" do; or if the Seller had affirmed it to be worth so
" much, no Action would lie; for in either Case
" the Purchaser might have informed himself of the
" Value.

Chandler v.
Lopez.
Cro. Jas. 41.

" And so in all Cases where the Purchaser may
" easily discover the true Value, or where the thing
" may be of more Value to one man than to another,
" as Jewels, Pictures, &c.

Butterfield and
Burroughs.
Salk. 21.
Tr. 5 A. B. R.

" Where the Defendant, having skill in Jewels, had
" a stone which he affirmed to be a Bezoar stone, and
" as such sold it to the Plaintiff, Judgement was
" arrested because the Declaration did not aver that
" the Defendant knew it to be not a Bezoar stone, or
" that he warranted it for one.

" If the Vendor affirm an Horse to be sound Wind
" and Limb, whereupon the Purchaser giving Credit
" to the said Assertion, purchases the Horse, which
" turns out to have been unsound at the time of the
" Sale, an Action will lie for damages occasioned by
" this Deceit: otherwise it seems, if it be a clear and
" evident

“ evident Defect: for then without a very special
“ Warranty a Man cannot be reasonably intended to
“ have included this in his Affirmation: he may in-
“ deed undertake for a plain impossibility, if he chuses
“ so expressly to charge himself, and shall then be
“ liable in a special Action on the *Warranty*: but
“ under a general Warranty palpable Defects shall not
“ be presumed to be included: unless the Horse were
“ purchased unseen on the Credit of the Warranty.

“ It has been said, if a married Man pretend to be
“ single, and marry A. B. she may bring an Action to
“ recover Damages for the Injury done her by the De-
“ ceit: but that such an Action will not lie for a Man
“ who is imposed on by a married Woman, because
“ the Conversation and Contract of the Wife will not
“ bind the Husband.

Skinn. 119.
¹ Lev. 247.

¹ Lev. 247.
Cooper v.
Witham.
20 Car. II.
Proctor and
Bury.
Hil. 17 G. II.
C. B.

“ Yet it should seem this latter Rule cannot be
“ without several Exceptions; for he may have paid
“ Debts in confidence of her being lawfully his Wife,
“ and that he was legally liable on her Account: and
“ it seems unreasonable that the real Husband should
“ not answer for this imposition practised by the Wife,
“ since he might have prevented it by not suffering her
“ to live as a single Woman, or by suing a Divorce.

“ The greater difficulty seems to be, with regard to
“ the Action on either side, that it is grounded on a
“ Felony; and that the private Tort therefore merges
“ in the Felony: yet the Court upon a Motion in

S s 3

“ Arrest

Garford v.
Richardson.
Tr. 36 Car. II. " Arrest of Judgement in such an Action brought by
" a Woman, gave Judgement for the Plaintiff, hold-
" ing the Action to be maintainable.

" And supposing the party tried for *Bigamy* and
" acquitted, there seems no Reason for doubting that
" in such Case the party dishonoured and aggrieved
" by a marriage thus illicitly contracted with her might
" bring his Action for the Deceit : for, as before has
" been observed, the Evidence on the Indictment is
" not Evidence on a civil Action respecting the Mar-
" riage.

P A R T III.

Of EVIDENCE upon ISSUES CRIMINAL.

" We are now to enter on the *third* and last Part of
" this *Third Book*: the subject of which will be the
" ORDINARY CRIMINAL JURISDICTION at COMMON
" LAW, and the EVIDENCE proper to the several
" Charges included under it.

" And this we think will be best treated by com-
" mencing the Investigation with those Misdemeanors
" which have been precedently considered in another
" View as the subject of civil Action: proceeding
" thence to Offences, which, though not capital, are
" the subject not of civil Action, but exclusively of
" Indictment; or, if ever of civil Action, yet so
" unfrequently and secondarily as not to be properly
" referred to our former Class of *neutral Causes*, for
" which either the private remedy or the public satis-
" faction was indifferently pursuable: our third Class
" will be capital Offences; not all, for it is a melan-
" choly Truth that this would open a wide and dreary
" Prospect indeed, but some of the most remarkable,
" beginning with those nearest to misdemeanour, and
" terminating with those which are the deepest Offences
" against Society.

Of Evidence upon Issues criminal.

" This will divide the Articles to be now considered
" into THREE SECTIONS:

I.

1. *Assault,*
2. *Slander,*
3. *Deceit.*

II.

1. *Barretry,*
2. *Perjury,*
3. *Corruption,*
4. *Extortion,*
5. *Malicious Mischief,*
6. *Riots and unlawful Assemblies,*

} *Where not felonious.*

III.

1. *Malicious Mischief,*
2. *Riots,*
3. *Forgery,*
4. *Coinage, where not regarded as Treason.*
5. *Grand Larceny,*
6. *ROBBERY,*
7. *HOUSE-BREAKING, HOUSE-BURNING, &c.*
8. *WILFUL SINKING of SHIPS, &c.*
9. *MAIHEM, and other extreme personal Outrages,*
10. *MURDER,*
11. *TREASON.*

SEC-

S E C T I O N I.

CHAPTER I.

Of Assault.

“ What is an *Assault* and *Battery* in general has been
“ seen already under the consideration of private
“ Wrongs, for which a compensation was to be given
“ in Damages by civil Action.

“ We have now only to treat of some few circum-
“ stances respecting these Offences, when prosecuted
“ by *Indictment* or *Information*.

“ And first, a *fighting* in private, though by con-
“ sent, with unlawful, and much more if with deadly
“ weapons, is an *Assault* which may be brought to
“ Trial by *Indictment*: if in public, it is such a con-
“ tempt of the public Peace, and such an incitement
“ to Disorder, that it is denominated an *Affray*. *

“ Again, an *Assault* is committed by stopping the
“ *Horse* on which a person rides.

“ On Indictment for *Battery* upon Dr. R. the Evi-
“ dence was, that the Defendant did *spit* in his face.
“ Per HOLT, Chief Justice, it is a *Battery*. And,
“ per *ipsum*, though one cannot justify a *Battery* by
“ *son Assaulet demesne*, by pleading it to an *Indictment*, yet
“ he may give it in Evidence upon *Not guilty*.

“ It is unnecessary to add, that an Indictment of
“ *Assault* may be maintained for turning loose a wild
“ Animal against a Man with intent to hurt or inti-
“ midate him.

T I T L E II.

*Of ASSAULTS specially circumstanced, and therefore
enhanced in Criminality.*

“ ASSAULTS in Places particularly appropriated to
“ the maintenance of *Peace* and good *Order* have

Comm. III.
145.
1 Hawk. P. C.
334.

Clayt. 109.
Booth v. Jen-
kenfon.
L. of Ev. 242,
(57).
6 Mod. 172.
Reg. v. Cotes-
worth.
L. of Ev. 237.

R. v. Gough.
Seff. Guildbs.
Jan. 1779.

* From Affraier.

“ been

" been discriminated by Law as liable to a more exemplary Punishment. The Principle in itself is obvious, but the Mode adopted for maintaining the Respect due to the Residence of the first executive Magistrate and to Courts of Justice is strongly marked with the harsh characters of a rude and ferocious Policy.

*Par. 2.**1. In the Palace.*

33 H. VIII.
c. 12. § 4—8.

" For it will seem strange to those not conversant in our legal History, that little more than two Centuries since a Bill should have passed under the Title " of *The Bill for the Household*: by which if a Person " strike another in the King's Palace, he shall have " Judgement to have his Right Hand stricken off, and " to suffer Imprisonment for Life. And there is a " disgusting Detail of the Ceremony to be used, and " the attendance for the performing of this Execu-

20 June, 1541.

* It appears that a few Months after the Statute Sir Edmond Knevet, of Norfolk, Knight, was arraigned and convicted by an *Inquest* of Gentlemen and Yeomen (whether a Moiety of each, or

report of Lords and Ladies, granted him pardon, and that he should lose neither hand, land, nor goods, but should go free.

¶ Harg. St. Tr.
xi. 16.

§ 26.

that the first is meant of a Grand Jury, does not appear) of striking one Master Clare, of Norfolk, Servant to the Earl of Surrey, in the King's House, in the Tennis Court. And when Judgement was on the point to be executed he desired (standing at the Bar, and expecting instantly to suffer the stroke) that the King would be pleased to take his left hand, and to spare the other: for if my right hand be spared, I may, said he, hereafter do such good service to his Grace as it shall please him to appoint. Of this submission and request the Justices forthwith informed the King, who of his goodness, considering the gentle heart of the said Edmond, and the good

§ The learned and judicious Editor remarks that it seems doubtful whether the prosecution was grounded on the Statute: and accompanies this Case with an observation on the infrequency of this punishment, which must relieve in a degree the Horror excited by the Idea of its possible existence.

There is a curious exception with regard to Noblemen, which appears to have more consulted their safety than their dignity. That nothing in the Act should extend to their striking their Servants with their hands or fists, or with any small staff or stick, for correction of offences. The same proviso is extended to other persons in general. But the mention of Noblemen striking their Servants with their fists is characteristic of those times.

" tion,

“tion, from the Lord Steward to persons in the most
“menial Offices.

“It is necessary, in support of this Indictment, to
“prove that *blood was drawn by the stroke*.

“An extraordinary Case is recited by Sir Edward ^{3 Inst. 140.}
“Coke, in which *Peter Burchet*, prisoner in the Tower,
“struck; within the Tower, *John Longworth*, his
“Keeper (who stood in a Window reading of the
“Bible) with a Billet on the head behind, whereby
“blood was shed, and death instantly ensued: this
“being without any provocation was adjudged *Murder*,
“for which he was attainted; and before his execu-
“tion (which was in the *Strand*, over-against *Somerset*
“*House*) his right hand was first stricken off by force
“of the Statute of 33 H. VIII. for that the Tower
“was one of the Queen’s standing Houses or Palaces.

*Par. 3.**2. In the superior Courts of Justice.*

“Another species of *Affault*, highly aggravated by
“the Place, consisted in drawing a weapon, with in-
“tent to strike any of the *Justices* of the superior
“Courts, or the *Chancellor*: and for this the Offender
“was to lose his right hand, to forfeit his lands and
“goods, and to be subject to perpetual imprisonment:
“so if any man actually strike a Juror, or any other
“person in *Westminster Hall*, or in any other place,
“sitting the said Courts, or before Justices of *Affize*,
“or *Oyer and Terminer*, he shall have, saith Lord Coke,
“the like punishment: but in that Case, if he make
“an

Affaults in Churches or Church-yards—on a privy Counsellor.

“ an *Affault*, and strike not, the Offender shall not
“ have the like punishment.

Par. 4.

3. In Churches or Church-yards.

5 & 6 E. VI.
c. 4.

“ A third species of *Affault* and *Battery*, punished
“ in a particular manner, is *striking* in Churches or
“ Church-yards: places which should suggest Ideas
“ capable of controuling the turbulence of passion,
“ and of subduing the rancour of malice: so as to
“ leave no place in the heart but for the calm and
“ benevolent Affections: but for this Offence the Le-
“ gislature has inflicted an *ecclesiastical*, not a civil cen-
“ sure, *Excommunication ipso facto*: and if he strike
“ with a Weapon, or draw with an Intent to strike,
“ that then, besides Excommunication, he have one
“ of his ears cut off, or having no ears, be branded
“ with the Letter *F.* in his Cheek. In these latter
“ Provisions the Legislature seems to have appointed a
“ Kind of Punishment which counteracts its own
“ Principle: attempting to check rude and ferocious
“ Conduct by an Infliction too strongly marked with
“ other characters than those of decent and temperate
“ severity.

Par. 5.

4. Affault on a privy Counsellor.

9 A. c. 16.

“ Attempting the life of a *Privy Counsellor*, when in
“ the execution of his Office, or assaulting, striking,
“ or wounding him in Council, or Committee of
“ Council, is Felony without Clergy: the particular
“ occasion of the Act is noticed in a subsequent part of
“ this Treatise.

“ These

Par. 6.

" These Articles are referred to the common Title
" of *Affault*, though so distinguished by Law that
" they might have classed a-part under an *bigger Denomination*: yet as the Act itself is the same, though
" differed by circumstances, and as in these times
" there is little probability of such offences being
" committed, at least those of striking in the Palaces,
" or in the King's Courts of Justice, it appeared suf-
" ficient merely to make mention of them here.

Par. 7.

Affaults with Intent to commit a Felony.

" We have to add, that not only common Acts of
" Petulance or Resentment, but *Attempts* of more
" atrocious Injuries to the Person, from the brutal Ex-
" cesses of other Passions, come under the legal Idea
" of an *Affault*, if no Evidence is given that the
" greater specific Crime has been actually perpe-
" trated.

CHAPTER II.

OF SLANDER AS A PUBLIC OFFENCE.

“ We are now to treat of SLANDER AS A PUBLIC
“ WRONG, subject to *Indictment or Information.*

TITLE II.

General Distinction between the CIVIL and the CRIMINAL
Suit.

“ The first and leading Distinction consists in this,
“ that where charged by *Indictment*, the Defendant
“ shall not justify by reason of the *Truth* of the
“ Words spoken, as in a private Action for Damages
“ we have seen that he might have done.

“ And this not only is understood to mean that he
“ shall not justify by Plea, but that he shall not be
“ permitted to give the Truth of the Words spoken,
“ or written, in Evidence on the general Issue.

“ It has been observed, that the first Decision
“ founded upon this Doctrine may be traced to the
“ *Star Chamber*: but if the Principle be just, and
“ such as any Court of Justice would equally have
“ adopted, had the Question originated elsewhere,
“ this circumstance will not affect the substantial Au-
“ thority.

“ Now, if the Rule be applied to mere personal
“ Attacks (and of such only we have at present to
“ treat) it will be found consonant to the Principles of
“ civil

" civil Order and to the Rights of Individuals, in their
" relation to Society. If a Man be guilty of an Of-
" fence, for which the Laws have provided a deter-
" minate Punishment, let the Thief, the Robber, or
" the Murtherer, be called to answer according to
" those Laws. There are Courts, there are Modes
" of Trial, there are prescribed Rules, for ascertain-
" ing the Validity of the Charge. But let not anti-
" cipated Censure go forth: irreparably injurious to
" the *innocent*; and not adapted to the ends of public
" Justice against the *guilty*.

TITLE III.

Of Libels on deceased Persons.

" It has been said that a *dead* Man may be libelled.
" And assuredly a wanton attack on the character of a
" deceased individual, wounding the Peace and ble-
" mishing the Honour of his Family, may be so made
" as to entitle the Son of the deceased to restrain, by
" an Appeal to the Authority of the Laws, this un-
" generous Treatment of the Memory of a revered
" Relation. To sue for *damages* he may justly dis-
" dain; a public Prosecution is the suitable resort.

TITLE IV.

Historical Statement.

" The Principles concerning historical Statement of
" Facts and Opinions relative to public Characters,
" belong to another Title: that under which we are
" to consider what constitutes a GENERAL OR PUBLIC
" LIBEL, in contradistinction to private Slander, and
" what amounts to an Exemption from this species of
" Delinquency.

" With regard to *personal* or *private* Libels, a Bill
" or Declaration in a legal suit is not to be considered
" as libellous, though it may import the severest Cen-
" sure on the Character of the Party, if it be *relevant*
" to the Point under judicial Inquiry.

Affley, Bart. v.
Younge.
a Burr. Mansf.
Soy.

" Thus, in an *Affidavit* in consequence of a Refusal
" by a Justice of Peace to license an Alehouse, these
" Expressions were contained—*And moreover*, I should
" have thought myself deserving of all which Sir J. A.
" hath so FALSELY sworn against me, if the Fear of
" any Power upon Earth could have moved me to act ju-
" dicially against my Judgement.

2 R. Abr. M.
Pl. 4.

" And the Court were clearly of opinion, that the
" Defendant was not answerable for this *Allegation*, com-
" prized in a legal proceeding, and material to the
" point in Question. And a very strong Case was
" cited, formerly determined upon the same Prin-
" ciple.

TITLE V.

Of PUBLICATION.

" Proof of *Publication* is necessary: and here it is
" to be seen what shall amount to Publication of a
" *personal* Libel; reserving the Consideration of a
" public Libel to its proper Place.

1683.
111. St. Tr.
P. 313.

" The Case of Sir Samuel Barnardiston is indeed an
" extraordinary one. This was an Indictment for a sup-
" posed public Libel: but it may notwithstanding be
" proper to consider it in this place, and to examine in
" what

“ what Light it could have been considered, had it
“ been a Letter addressed to one of the parties *cri-
nated* in it.

“ The Evidence against the Defendant consisted in
“ Letters to a Friend intercepted at the Post Office.
“ And the Chief Justice *Jefferies* placed the whole
“ stress that they being sealed and directed, and sent to
“ the Post Office, it could be for no other purpose
“ than for Publication.

P. 322.

“ But this is to place an *intent* to commit a *miske-
meanor* on the foot of an intent, manifested by
“ overt Act, to commit *Treason*: notwithstanding the
“ marked distinction in Law between the two Cases.

“ The true Line appears to be otherwise drawn by
“ the Law of this Country; and that the *Act* of Pub-
“ lication must take place before the party can be
“ legally chargeable.

“ A personal Libel is published when it arrives to
“ the person against whom it is written, pursuant to the
“ design of the Author, or is made known to any
“ other person by any means to which the dissent of
“ the Author is not necessarily implied.

IV Comm. 150.
2 Brownl. 151,
12 Rep. 35.
Hob. 215.
Popl. 139.
Haw. P.C. 195.
Moor, 813.
Hob. Pl. 63.
Barrow v.
Lewellin.
12 Rep. 35.

TITLE VI.

General Remarks.

“ We will not here mispend time on the Conceit of
“ a Man’s being punishable for a Libel on himself.

T

“ There

“ There are other Questions concerning Publication :
 “ which, together with the Evidence of the libellous
 “ import of the matter charged, will be more pro-
 “ perly considered under the head of *public Libels*, in
 “ which chiefly they arise.

Rex v. H. Bate,
cl. 1780.

“ In this, as in other Cases of Misdemeanor, the
 “ single Evidence of an Accomplice is held sufficient
 “ to convict.

TITLE VII.

Information, Rules concerning.

“ On an *Information*, the Court, where the Nature of
 “ the Subject will admit, requires the party applying
 “ to make ground for this extraordinary relief, by swear-
 “ ing that he is innocent of the charges imputed to
 “ him.

*Rex v. Denni-
 son.*
Hil. 13 G. III.
B. R.

“ But where the charge is such, by its ambiguous
 “ and artful Mode of Insinuation, that the party cri-
 “ minated, if innocent, cannot see how specifically to
 “ answer it, this Rule does not hold.

*2 Burr. Mansf.
 E. 33 G. II.
 R. v. Benfield
 and Saunders.
 980.*

“ There is a curious Case of *Information* for a
 “ *Libel* joined with another Offence : it is this : There
 “ were four Counts in the *Information*. The first
 “ charged the Defendants, with others, of a *Riot*; the
 “ second, for publishing a *Libel*; the third, a *Riot and Libel*; and the fourth, that they, maliciously intending
 “ to disquiet *Daniel Cooke* (the Prosecutor in the Name of
 “ the Crown) and to destroy his domestic Peace and
 “ Happiness in his Family, and the comfort he had in
 “ his two Children, *John and Jane Cooke*, and to hurt
 “ and

“ and injure him the said *Daniel* in his Trade and Bu-
“ siness of a Grocer, and to traduce and scandalize his
“ said Son and Daughter, *J. C.* and *Ja. C.* being per-
“ sons of good name and of chaste and virtuous
“ lives and conversation ; and to suggest the said son
“ was a dishonest ill-disposed person, and the said
“ daughter a dissolute, &c. and an ill-disposed per-
“ son, and to make it be believed that she had been
“ got with child of a bastard, and had been delivered
“ of a bastard child in *London*, in order to conceal its
“ birth ; and devising to hurt them the said *J. C.* and
“ *Ja. C.* in their good name, and to bring them into
“ hatred and contempt, did, with loud voices, and in
“ a public and ludicrous manner, in the presence of
“ divers liege subjects, sing, publish, and pronounce
“ divers false, scandalous, malicious, and obscene *libel-*
“ *lous* songs, of and concerning the said *J. C.* and
“ *Ja. C.* greatly reflecting upon the characters and
“ reputations of them the said *J. C.* and *Ja. C.*

“ The Information then sets forth the two songs se-
“ verally : applying them to the son and daughter by
“ necessary innuendoes. On this fourth Count the
“ Defendants were found guilty.

“ These points were determined.

“ That the two Songs, affecting the two persons,
“ son and daughter of *D. C.* are well included in one
“ Indictment ; the charge jointly applying to both,
“ that they were sung at the Father’s door, to discredit
“ him and his children, and disturb his domestic peace
“ and comfort.

*Difference between Action where one of the Counts is bad,
and Damages on the whole, and Information.*

“ That the two Defendants were well joined in one
“ Indictment, where the Offence arises wholly from a
“ joint Act criminal in itself.

“ That if the latter song were not libellous, it
“ would only, upon Indictment or Information, go to
“ lessen the Punishment, and not to arrest the Judge-
“ ment, it not resembling the Case of an Action where
“ there are several Counts, and *several Damages* given;
“ and one of the Counts being bad, the Plaintiff, if
“ this be objected, cannot have Judgement: for the
“ reason for which this applies to Actions does not
“ hold in Indictments or Informations.

“ Of those which have been prosecuted under the
“ Denomination of *blasphemous Libels*, it is not now
“ the place to speak. Some notice will be taken of
“ them in the latter part of this Work.

CHAPTER III.

Of CHEATING.

" To deceive another of his property, either in
" transactions of business or in stipulations of amuse-
" ment (as if a person play with false dice) is an Of-
" fence at Common Law, punishable by Fine, Impri-
" sonment, and the Pillory.

2 Hawk. P. C.
188.
Comm. IV.
158.

" With reference to particular Trades, a great mul-
" titude of Statutes have been enacted for the pre-
" vention of *Deceit*.

" In regard to Bakers || in breaking the Assize of
" Bread, with respect to Price, Quantity, or Qua-
" lity, and Butchers selling bad meat ¶.

|| 31 G. II. c. 29.
3 G. III. c. 6.
c. 11.
¶ 51 H. III.
c. 7.

" With regard to the Brewers § and Vendors of Beer,
" Wine, and other Liquors, the Sellers and the Spin-
" ners of Wool; † Goldsmiths ‡ and Tradesmen of al-
" most every considerable Description.

§ 1 J. I. c. 18.
12 Car. II.
c. 25. § 11.
† 28 G. III.
‡ 12 G. II.
c. 26.

" To another species of Deceit, by obtaining Money
" or Goods under false pretences, remedy is applied
" by two Statutes, which punish by imprisonment,
" fine, whipping, pillory, or other corporal pain, as the
" Court shall direct, or by Transportation, the Of-
" fence of defrauding another of any valuable chat-
" tels, by any false token, counterfeit Letter, or false
" pretence, or of pawning or disposing of another's
" Goods without consent of the Owner.

33 H. VIII.
c. 1.
30 G. II. c. 24.

TITLE II.

*Witness interested in the Question as suffering by the
Deceit charged.*

" On this head instances occur in the Books, of
" Evidence admitted for the Detection of Fraud,

* Of this last Act, when its operations and consequences come to
the Test of Experience, a Judgement will be formed: less advanta-
geous probably to its promoters than to its opposers

Where the Party cheated shall be a Witness.

" which will farther illustrate the Title discussed al-
 " ready, of Exceptions to the Competency of Witnesses
 " on account of Interest.

Ventr. 49.
 2 Sid. 431.
 2 Kab. 572.
 Str. 593.
 Salk. 236.
 25 Mo. 340.

In an Information of a Cheat in obtaining a Judgment, the *Wife* of the Person against whom the Judgment was obtained was allowed to be Evidence; because on such Information the guilty person is fined to the King; "and" that "alone" is the mere Result of the Prosecution: for although the Court doth often set aside the Judgement to vindicate the Affront done to the Court, yet that is not a natural nor a necessary consequence of the Prosecution, and the Grace of the Court ought not to stop the Course of the Law, or deprive the King of a Witness to punish Offenders.

The Defendant was found guilty "accordingly" upon the oath of the party "cheated;" and the Judgment was afterward vacated.

Rex v. Nunes.
 2 Str. 1043.
 Rex v. Whiting.
 Salk. 283.

" In Strange this opinion is controverted by the CHIEF JUSTICE: * and the Case in *Salkeld*, with the Opinion of Lord HOLT, is mentioned as an Authority to the contrary.

Rex v. Brough.
 222.
 Str. 1229, 30.

" And when this Point came afterward to be argued on an Indictment of *Perjury*, the Case was this:

" One *Wbarram* employed *James Broughton*, the Brother of the Defendant, to sell a distant Estate for him: *Wbarram* charged *James* with having sunk 700*l.* of the purchase-money, and filed a Bill, on which he obtained a Decree to account:

* Hardwicke.

" after

" after this *James* pretended to have found a written Account, wherein he had given *Wbarram* credit for the 700*l.* obtained a re-hearing and examined his Brother, *Thomas Broughton*, the Defendant, who swore that *James* sent him the Account into *Yorkshire* to shew *Wbarram*, which he accordingly did: *Wbarram* owned it to be his hand, and declared that he had forgotten it. The Chancellor was of opinion this account was a forgery, and therefore varied not his Decree: but recommended the prosecution of *James*; who thereupon run away.

" *Wbarram* then indicted the Defendant for *Perjury*, and offered *himself* as a *Witness*: which was opposed by *Strange* on the Authority of *Rex v. Whiting* and *Rex v. Nunez* already cited; and also of a Case subsequent to those, in which the Chief Justice *Lee* refused to suffer any of the Defendants in *Ejectment* against whom the Verdict had been given to be examined on an Indictment for *Perjury* in Evidence given on that Trial.

Rex v. Ellis,
G. Hall.
Mic. 12 G. III.

" And on this Case *Lee* Chief Justice declared he was for hearing the Evidence of *Wbarram*; because as no Bill of Exceptions would lie, the Prosecutor would otherwise be without remedy, and the Defendant if convicted might move for a new Trial: He said he would give no opinion at present, farther than observing that in *Nunez's* Case the suit in the Exchequer was then depending, whereas the suit in Equity in the present Case appeared to be at an end.

" Thereupon *Wbarram* was examined: and in all parts of his examination contradicted the Defendant: But *Strange* insisted that being only a single

T t 4

Witness

V. supra.

" Witness in point of *Perjury* there was no occasion to go into a defence: Of that opinion was the *Chief Justice*, and the defendant was acquitted.

V. supra.
235, 7.

" In the discussion of these Authorities in the Case already cited, the Principle of the Decision in this Case of *Broughton*, and *Parris's Case* is mentioned with decided Approbation: And the Point now appears to be settled. And that Case indeed, as we have seen, goes farther than grounding the Rule upon the Right of adducing Evidence on behalf of the Crown to support a criminal Prosecution: it goes to the general Question, whether where the witness on a *qui tam* Action offers Evidence to maintain the suit, in order to punish the Lender on an usurious Contract, the objection that he testifies in his own favour shall go to his Competency, although his Evidence could not be used, nor a Verdict, grounded upon it, produced, in a direct suit to defeat the Contract; or whether it shall be taken as a circumstance of influence going only to his Credit. To repeat this now may be thought not improper, because the Distinction is of importance; and the extent of the Rule merits to be clearly understood.

" Upon that occasion *Smith's Case* was examined: which was this;

V. supra 233.
Co. Litt. 6 b.

" *Smith*, the party to an usurious Contract, offered himself as a Witness on an Information founded on the Statute against *Usury*: and it was resolved that he shall not be admitted: because he should then in effect be Witness in his own Cause, and avoid his own Bonds and assurances, and discharge himself from the Money borrowed: and though he commonly raise up an Informer to exhibit the Information, yet in Truth he is the party.

" This latter Reason we may remember the Court
" entirely rejected, and on the other they seem to have
" decided, (though with reference to the peculiar cir-
" cumstances,) on the Ground that a Witness cannot
" be said to avoid his Contract by testimony which
" would not be receivable on an Action of Debt upon
" the Contract.

" In *Bunn's Case* indeed there was a *Pledge* double
" the Value of the Loan: and of course the Plain-
" tiff either had the Money or would have retained
" the Pledge: but the reasonings go to the Admissi-
" bility of his Evidence independent of that particu-
" lar circumstance.

" It is held that at Common Law obtaining Money
" (or other things) on a bare verbal Assertion that a
" person entitled to receive it sent for it, is not *indi-
" able* as Deceit; for it is accompanied with no artful
" contrivance, but dependeth wholly on a bare lie: and
" it is said to be needless to provide Laws for mis-
" chiefs against which common Prudence and Caution
" may be a sufficient Security.

" And on the Statute of *H. VIII.* just cited, the fol-
" lowing Case has been determined: that where the
" Defendant came pretending such a person had sent
" him to receive 20*l.* and received it, whereas the said
" person did not send him; that it was not indictable
" unless he came with *false tokens*.

" The words of the Act are, *If any person falsely* 33 H. VIII.
" *and deceitfully obtain or get into his bands or possession*
" *any money, goods, chattels, jewels, or other things, of*
" *any other person by colour and means of false token.*

" And it seemeth that the indictment should aver
" specially what the false tokens were: fraudulently
procuring

Distinction between a private Breach of Contract and a public Fraud.

H. 13 G. II.
Rex v. Munoz
1. Sess. C. 201.
Str. 3227.

"procuring Money from a person by affirming there was a person in the next room who would pay, is not within this Statute: for this is no Evidence of a false token, but of a false affirmation only.

E. 3 G. II.
R. v. Brian.
Sess. C. V. 2.
37.

"And an attempt to defraud, not accompanied with success, cannot be given in evidence under this Statute.

R. v. Wheately.
Hil. 1 G. III.
3 Burr. Mansf.
3225.

The Defendant was indicted for selling Beer short of the due and just measure; to wit Sixteen Gallons as and for eighteen: and on this Indictment he was convicted.

1 Bl. R. 273.
S. C.

R. v. Gofn.
Broon.
Hil. 24 G. II.
R. v. Dryfield.
Tr. 1754.
27 and 28 G.II.
1 Saik. 151.
Nenutt's C. A.
P. 4. A. B. R.

In Arrest of Judgment it was moved that this was not indictable: being not a selling by false measure; but a breach of a Civil Contract for which the party injured should have sued to have satisfaction in damages. And a Case was cited as in point to this distinction: and another Case, for selling Coals as and for two Bushels, being a Peck short of the Measure: and a case in Saikeld of a remarkable breach of Contract to a considerable Amount, not held indictable.

The Court was accordingly of opinion that this must be considered as an imposition detrimental to the individual who suffers by his own carelessness, and who may have his resort to his civil remedy by Action; but that it is not such an offence as, like selling by false weights and measures, affects the Public: no false Tokens are given; it is only a non-performance of his Contract.

"Mr.

" And Mr. Justice *Wilmot* cited a Case where, upon
" an Indictment for selling six Chaldrons of Coals,
" which ought to contain thirty-six Bushels, at six
" Bushels short, Lord *Raymond* was so clear that he
" ordered the Defendant to be acquitted.

R. v. *Nicholson*.
Sittings after
Mich. Term,
4 G. II.

" But in another Case this Doctrine seems to have
" been carried too far: or rather, that the *Evidence*
" did not take the Case out of the Statute.

" That was a Case of selling Ale in vessels *marked*,
" as containing such a measure: which seems to be
" clearly a *false token*: yet the Indictment was quashed
" on Argument upon Motion. Mr. Justice *Foster*
" expresses himself not satisfied with that Case.

R. v. *Wilders*.
Mic. 6 G. I.
B.R.
2 Burr. Mansf.
1129.

" Another Indictment for selling Oats, as and for
" four Bushels, whereas they wanted half a Bushel of
" the just and due measure, was quashed the same
" day with that against *Wilders*; the Counsel, who
" was to have argued for it, acknowledging it could
" not be supported.

R. v. *Dunnage*.
2 Burr. Mansf.
1125.

" And in *Wheatley's* Case, as in a preceding one,
" this Fraud was compared to that of selling an un-
" sound Horse for a sound one; the Remedy for
" which could be only a civil one.

2 Burr. Mansf.
1128.

" On the other hand, where no civil remedy has been
" deemed to be open, for the security of the public
" an Indictment may. As if a Minor goes about
" Town, and pretending to be of age, defrauds per-
" sons

Bart. 100.

" sons of their Goods, and pleads *Non-age*, he may
" be indicted for this *mal-practice* as a common Cheat.

TITLE II.

Witchcraft.

9 G. II. c. 5.

" *Witchcraft** is now reduced to this Title, in effect :
" for no prosecution shall be carried on, or suit or pro-
" ceeding commenced against a person for witchcraft,
" sorcery, enchantment, or conjuration, or for charg-
" ing another with any such Offence.

" But a person pretending to exercise Witchcraft,
" or to tell fortunes, or by his skill and knowledge in
" any occult or crafty science to discover goods or
" chattels supposed to have been stolen or lost, shall,
" on conviction, upon Indictment or Information, suf-
" fer imprisonment for one Year; and once in every
" quarter of the said year stand for an hour in the
" pillory of the market town in the county where
" the offence was committed; and may also be com-
" pelled to find sureties for good behaviour.

* Jefferson's Notes on the State of Virginia, p. 241, 2.

The revised Code* of Virginia proposes treating this Pretension in the same manner. But if ducking were the Punishment affixed in England (as that Code suggests for the State for which it is designed) I fear the old habit of swimming (otherwise drowning) of Witches would revive. Beside that I think the comic Vizor a very unseemly Masque to be worn on the awful Countenance of public Justice. And here I am necessitated to observe a very different objection strikes me to a species of Mutilation, at which Modesty and Humanity revolt, recommended by the same Code as the Penalty for certain Crimes, against which, I trust, Virginia has an adequate security in Climate, Constitution, and the Manners of its Inhabitants. The Jurisprudence, criminal especially, that may be adopted by the American States, is an object of unspeakable importance. There are admirable Lightis in the political Productions of that rising Empire (for so I trust it is) of Peace, Freedom, and Virtue. Their Candour will accept a well-intended remark, should it happen to reach them: and their Wisdom will weigh the Grounds of it.

SECTION II.

“ We are now arrived at that Class of Offences
“ which is rarely the subject of a civil Action but of
“ a criminal Prosecution : some of them frequently ;
“ others, especially the first, more rarely.

CHAPTER I.

Of BARRETRY.

“ *Barretry* is the stirring of Quarrels and Conten-
“ tions. And a *Barretor* is he who is a common
“ mover, exciter, or maintainer of suits or quarrels,
“ either in the Courts of Record, or in the Country,
“ in Courts generally not of Record.

<sup>3 Inst. 368.
2 Hawk. 243.</sup>

^{Tr. p. P. II. 97.}

“ It has been held that an Indictment is good for
“ this crime without alleging any *place* certain : be-
“ cause, from the Nature of the thing, consisting in a
“ repetition of several acts, it must be intended to
“ have happened in several places.

^{Comm. IV. 134.}

“ And this, with the Offence of being a common
“ Scold, seem to be almost the only offences for which
“ an Indictment will lie, without shewing any of the
“ particular facts in the Indictment, it consisting of
“ multiplied instances. But the Defendant should
“ have notice sent him of the particular matters in-
“ tended to be proved against him.

“ It

L. of Ev. 37.
B. R.
Anno 1657.

" It was disputed whether a Conviction of this
" Crime appearing on Record incapacitated *Testimony*.
" And it was held by *Glynn*, Chief Justice, and *Newdigate*, Justice, that it did not; *Maynard*, Serjeant,
" holding strongly against it.

" Now undoubtedly it should seem there are degrees
" of this Crime truly infamous: such as the wilful
" and continued stirring of groundless suits, which
" can hardly be thought to leave a much greater regard
" in the Witnesses to truth upon Oath. But perhaps the
" multifarious nature of this charge, which comprehends
" a variety of misdemeanors of different degree
" is the ground of this opinion.

8 Rep. 37 b.

" Lord COKE seems to be of opinion that the Facts
" proved should be more than *two* instances.

3 Mod. 97, 8.
Hil. 1 J. II.
1685.

" In another Case, on an Indictment for *Barretry*,
" the Evidence was this:

" One G. was arrested at the suit of C. in an Action
" for 4000*l.* and was brought before a Judge to give
" Bail to the Action. The Defendant, who was a
" Barrister at Law, was then present, and (most un-
" becomingly, if it had been even a just suit, for he
" was acting out of the line of his Profession, and
" engaging in the province of an Attorney) did so-
" licit this suit: when in truth at the same time C.
" was indebted to G. in 200*l.* and G. did not owe C.
" a farthing.

" The

" The Chief Justice * was of opinion, that this * *Herbert.*
" might be Maintenance, but not *Barretry*; unless it
" appeared that the Defendant did know that C. had
" no Cause of Action: for that a Man should be
" arrested for a very trifling Cause, or for no Cause,
" is (in itself) no *Barretry*, though a sign of a very
" ill Christian. It must be, not from a disposition to
" contest small matters, or an error of Judgement,
" but a *design* to ruin or oppress his neighbour.

" But it appearing that the Defendant did enter-
" tain C. in his House, and brought several Actions
" where nothing was due, the Defendant was found
" guilty.

CHAPTER II.

Of PERJURY.

Comm. IV.
Ch. 10. § 16.
III. Inst. Ch. 74.
p. 163.
5 Eliz. c. 9.
21 Jas. I. c. 28.
2 G. II. c. 24.
§ 6. perp. by
9 G. II. c. 18.
23 G. II. c. 11.

"The next, and a most heinous Offence against public Justice, is PERJURY. The legal Definition of *Perjury* is a wilful false swearing upon a lawful Oath administered in a judicial Proceeding, on a point material to the Fact in question.

TITLE II.

Court.

"Of extrajudicial Oaths the Law in this respect taketh no Notice: for esteeming all other than Oaths judicially administered unnecessary at least, it therefore will not punish the breach of them; lest it should appear to give an indirect sanction to the administering of such oaths; a practice tending to great abuse.

Depositions in *Chancery* are not in themselves Records: but "it is said that" they are oaths in a Court of Record in "such sense as that" a Witness swearing falsely may be prosecuted upon the Statute; "he may undoubtedly be prosecuted at *Common Law*. But as to the Statute, the safer reason is the express words of the enumeration, in any of the Courts of *Chancery*, &c."

Tr. At 4.
V. supra, 48, 9.

Depositions taken in the *Spiritual Court*, in a Cause relating to Lands, cannot, "as we have seen," be read: because they are no oaths, inasmuch as the Spiritual Courts have no Authority to take Depositions relating to Lands: but they may be read when taken in a Cause in which they have Authority, inasmuch as they

they are lawful oaths, and a man may be indicted for the violation of them, though they be not oaths in any Court of Record.

2 Sid. 454.
Mar. 120.
Styl. 1.

“ And for such false Oath” in the Ecclesiastical Court, or in the County Court, a man may be indicted at Common Law; but not upon the Statute of “ Elizabeth, it has been said;” for the Statute expressly mentions “ the Courts” in which the Perjury must be committed to become punishable within that Law;—“ any of the King’s Courts of *Chancery*, the *Star Chamber*, the *Whitehall*, or elsewhere, within “ any of the King’s Dominions of *England* or *Wales*, “ or the Marches of the same, where any person or “ persons have or should have Authority by virtue of “ the King’s Commission, Patent, or Writ, to hold “ Plea of Lands, or to examine, hear, and deter- “ mine any Title of Lands, or any Matter of Wit- “ ness concerning the Title, Right, or Interest of “ any Lands, Tenements, or Hereditaments, or in “ any of the Courts of Record, or in any *Leet*, *View* “ of *Frankpledge*, or *Law-day*, antient *Demean Court*, “ *Hundred Court*, *Court Baron*, or in the Court or “ Courts of the *Stannery*, in the Counties of *Devon* “ and *Cornwall*.

2 Sid. 454.
Hawk. P. C.
173.
Cro. Eliz. 185.
Christian Place
v. Howe, 609.
Shaw v. Tom-
son. S. P.
2 R. Rep. 410.
R. Abr. 40.
pl. 12.
Dier. 243 pl. 53.
Leon. 131 ca.
179. is not con-
trary; for it
affirms that
Perjury before
the Spiritual
Court is punish-
able at Common
Law; and it is
in reality the
very Case in
Cro. 185. so
that the Contr.
in the former
Edition is mis-
taken.

But a Perjury in any Court that hath Authority to examine the Cause, in relation to which the Perjury is committed, may be punished at Common Law; for it were preposterous that they should give a Court Authority to examine upon Oath, and not punish the Violation

lation of that Oath: but it seems that if the Court have no Authority to examine the Cause, then such *Perjury* cannot be punished: for an Oath taken *coram non Judice* is no Oath in Law; for the Law cannot take notice of an Oath but where it gives Authority to "administer" an Oath; for if there be no lawful power to tender an Oath, it must be but an insufficient swearing; an Oath not regarded "or countenanced" by the Law, and therefore not punishable as the Oath "lawfully and judicially administered" is "when falsely "taken.

Amic and Andrews.
Mod. 166.
Danv. Abr. 45.
pl. 24.

Yelv. 111.
Paine's Case.

" And agreeably to this Distinction is the Notice " taken of the difference between such voluntary Af- " fidavits and an Oath on which *Perjury* might be af- " signed, where" a man *assumed* that in *consideration* the Plaintiff would bring two Witnesses to swear his Debt before a Justice of the Peace, he would pay it: " and " the Plaintiff charges that he did bring two Wit- " nesses accordingly, but that the Defendant refuses to " pay :" and " the Court held that" this Oath, though *extrajudicial*, and though the Justices had no Authority in the Matter, was a good *consideration*: for the Oath tending to a Decision of Right was not contrary to the Law of God, and therefore the parties might assume upon that consideration; but it is not such an Oath of "which" the Law takes notice to punish it as *Perjury*. " * And if the Court have Jurisdiction " in certain Causes, yet if it have none in the subject on

* But although Wyndham and Atkins admitted that Oath as the Ground of an Assumpsit, and rightly, as it seems, the Jealousy entertained of extrajudicial Oaths is remarkably expressed in that Case: for Vaughan was for rejecting it entirely as no Ground of a Consideration: he said it would be of dangerous consequence to countenance these extrajudicial Oaths; for that it would tend to the overthrowing of legal Proof. And he added, which however seems rather ex abundanti, that he thought every Oath not legally administered was within the statute against profane swearing.

" which the Oath is taken, this is obviously the same
" as if it were no Court.

TITLE III.

Oath.

" In an Indictment for *Perjury*, it is neither necessary Rsyn. 178.
" nor proper to lay that the Oath was taken on the
" *Holy Gospels*: for, as we have seen, it may, accord-
" ing to the Religion of the party, be taken either on
" the *Pentateuch* or the *Koran*, or in any Mode esteemed
" by the Laws and Religion of his Country binding
" on the Conscience of the Witness: *duly sworn* is
" therefore the proper expression; and the *Evidence*
" will support it, if it answer these Requisitions.

" The first instance that is to be found in our Books
" of thus adapting the sanction to the sentiments of
" the attesting party was that of a *Jew*: he is sworn
" to his Answer in Chancery upon the *Pentateuch*,
" agreeably to very ancient Usage of the *Common Law*:
" according to which it is stated, in the Opinion of
" Lord MANSFIELD, in the Case on *Affirmation*, that
" they were thus sworn prior to the 18 E. I. when they
" were expelled the Kingdom.

Vern. 263.
C. 258.
Mic. 1684.

Cwp. 389.

" But it was long ere those, who professed a Re-
" ligion not recognized as a part of authentic Reve-
" lation, were considered as competent to give Evi-
" dence under the sanction of that Religion which they
" believed to be true.

" This, however, in the Case already cited, of
" *Omicbund and Barker* was established: and Testimony
" on the *Koran*, was afterwards, by all the Judges of
" England, resolved to be receivable in a capital Case.

In 1774.
V. *supra*, p. 268.

" It does not appear necessary that the Witness (if
" professing Christianity) should have kissed the Book,
" whether the entire *Bible* or only the *NEW TESTA-*

“ MENT: and perhaps this Ceremony were much
 “ better disused; as it cherishes Superstition in some;
 “ Contempt of the real sanction of an Oath in others;
 “ and suggests, it is to be feared, to many the Imagina-
 “ tion, alike ignorant and profligate, of escaping both
 “ the temporal Punishment and the Guilt, if they
 “ evade but this circumstance.

“ It were doubtless to be desired that the Occasions
 “ of Oaths were much diminished, and an unaffected
 “ Solemnity in administering an Oath observed: not
 “ amid the noise and buzz of a Court, but in that at-
 “ tentive silence, which is said to prevail in the Nor-
 “ thern part of the Island, where the Witness is sworn
 “ after an awful Admonition, not by the Officer but
 “ by the Judge.

Coup. 390.

3 Burn, 295.

2 Ld. Raym.
889.
Regina v.
Rhodes and
Cole.
1 Ld. Raym.
256.
Rex v. Griepe.

TITLE IV.

Matter.

“ The Perjury must be in a point material, that is,
 “ relevant to the Issue: it is by no means necessary it
 “ should be on a point sufficient in itself to decide the
 “ Cause; if it is to any circumstance material, as the
 “ colour of a coat, in case of an highway robbery,
 “ the party thus wilfully swearing false is equally liable
 “ as if it were directly decisive on the point in issue.

“ A Man may be convicted of Perjury, although
 “ he swears to his Belief of a Fact: but then it must
 “ be made decidedly clear, not only that the Fact was
 “ not as he had sworn that he believed it to be, but
 “ that by the strongest circumstances his Belief of the
 “ supposed Fact was by him falsely sworn, contrary to
 “ the persuasion of his mind concerning it, which
 “ may be drawn from circumstances in the Fact itself,
 “ or in his Evidence respecting it.

§ Nov. 1780.

* Loughbo-
rough.
Addington's
Pen. St. p. 459.
34 Ed. 1786.

“ And it is said that in a Case § before the Lord
 “ Chief Justice of the *Common Pleas** the same was
 “ ruled by all the Judges of that Court.

“ If

TITLE V.

Essential Character of the Crime.

" If the Words of the Defendant are false in the
" only sense in which they relate to the subject in dis-
" pute, * this is sufficient to convict him of Perjury,
" though in another sense, foreign to the Issue, they
" might be true.

" Edward Aylett, an Attorney, was indicted of Per-
" jury: and the Indictment stated that he was Soli-
" citor in a Cause depending in Chancery, and attended
" on the hearing. That after the hearing he was duly
" arrested. And that he being so in custody, com-
" plaint was made to the Lord Chancellor in his be-
" half, that he (the Defendant to the said Indictment)
" was arrested in his way from attending on the said
" Cause to his own house. And that afterwards he
" did appear, and was duly sworn and examined before
" the Chancellor on the said Complaint. And the
" Indictment (*inter alia*) avers, that he the said Ed-
" ward Aylett, to procure his Discharge from the said
" Arrest, falsely did swear that he had not been at
" home after attending the said Cause, and that he
" was arrested on the steps of his own door, on his
" way home from attending the Court in the said
" Cause, and before he had been within the door of
" his house (*innuendo* that he was arrested and taken
" on the steps of the outer door); whereas in truth
" and in fact the said E. A. had been *at* his house, and
" was not arrested and taken on the steps of the
" outer door of the house.

" He was convicted: and in Arrest of Judgement.
" it was, *inter alia*, moved, that this Assignment of
" Perjury was bad: for that it did not falsify the De-
" fendant's Oath: for that he might be *at* and yet not

M. 26 G. III.
T. R. 63.
R. v. Aylett.

* *Fraus enim adstringit, non dissolvit, Perjurium.—Cic. de Off.*
III. 32.

" within the house, and the *innuendo* concerning the
" outer door introduces a new idea not warranted by the
" previous matter.

T. R. 69.

" Lord MANSFIELD, in delivering the Opinion of
the Court, recognized the Doctrine already stated,
" that *Perjury must be a wilful false swearing on an Oath*
" taken in a judicial Proceeding before a competent Juris-
" diction, and on a Point material to the Question de-
" pending. That here the point sworn must be under-
" stood in the only sense in which the Defendant could
" offer it before the Lord Chancellor as a Ground of
" Discharge, that he was arrested before his return
" home; while his legal privilege as a Solicitor attend-
" ing on the cause remained consequently in force.

" The Indictment avers that he had been at his
" house before he was so taken and arrested; and the
" *innuendo* refers the Words, *the steps of his own door*, to
" the outer door, rightly and without varying the idea;
" for no other door would have answered the Defen-
" dant's purpose as entitling him to privilege (or have
" consisted with his allegation in his complaint that he
" was arrested before he was at home, and before he
" had been within the door of his house).*

" Lord MANSFIELD, on a former occasion, men-
tioned a Witness *perjuring himself by swearing that*
" a person, whose health was in question, he left in
" such a way, that, were he to go on as he then was, he
" could not live two hours. It afterwards turned out
" that the party was very well, but had got a bottle
" of gin to his mouth; and true it was, in a sense of
" equivocation, that, had he continued pouring the
" same liquor down, even for much less time than two
" hours, he was infallibly a dead man.

* The Words between the parentheses I add, as conceiving them included in the purport of the reasons on which the Judgement was founded.

TITLE VI.

Who may be Witnesses.

“The three subscribing Witnesses to a Will, who had sworn the incapacity of the Testator to make one, were convicted of Perjury; the Will having been first established by clear Testimony.”

Rex v. Nueys
and Gelly.
1 Bl. 426.
and 365.
V. supra, 322.

There are several Informations of *Perjury* against A. B. and C. on their Depositions in Chancery concerning the same Point: on the Trial of A. —B. and C. may be Witnesses; for they cannot, “as we have seen above,” be excluded by reason of infamy, until they are “attainted by Judgement: for before, even “on a Conviction, it goes to their Credit but not to “their Competency:” and they cannot be excluded as interested, because the “testimony” of one is not Evidence either for or against the other, where the parties, “not being” the same, had not the Liberty of cross-examination.

Hal. sup. Lit. 6.
2 R. Abr. 685.
Forts. Rep. 27.

Lee and Ganfel.
Hil. 14 G. III.
Cowp. 3.
V. supra, 31, 2,
and 261.

TITLE VII.

What shall be Proof of Perjury before Commissioners.

“An Information was exhibited against one for *Perjury*: setting forth that a Bill in Chancery was exhibited by A. B. and the Proceedings thereupon: and the Perjury was attested in a Deposition made by the Defendant 30 July, 1683, and taken in that Cause before Commissioners in the Country. It was tried at Bar, and the Question was, whether the Return of the Commissioners, that the Defendant made oath before them, shall be sufficient Evidence to convict him of *Perjury*; without their being present in Court to prove him the same person. Serjeant Pemberton admitted, an Information will lie against him in this Case: but contended, that the Commissioners must be present, or some other person, to prove that the Defendant made the oath before them.

3 Mod.
116. Anon.
H. MSS. I.
Law of Ev. 289
(49).

U u 4*

“ That

“ That if a true Copy of an Affidavit made before
“ the Chief Justice be produced at a Trial, it is not
“ sufficient to convict a man of *Perjury*.

V. *supra*, 53.

“ That this is not like the Case of *Perjury* assigned
“ in an *Answer* in Chancery taken in the *Country*: for
“ that is under the party’s hand: but here is nothing
“ under the hand of the Defendant, and therefore
“ the Commissioners ought to be in Court to prove
“ him to be the Man.

“ The Court were equally divided. The Chief
“ Justice and *Wythens*, Justice, were of opinion that
“ it was *not* Evidence to convict the Defendant of
“ *Perjury*: it might have been otherwise upon a
“ Return of a Master in Chancery; for he is upon
“ his Oath. And they held direct proof must be given
“ here of the swearing: in like manner as if an
“ Affidavit be made before a Justice of Peace of a
“ Robbery, as enjoined by the statute, if you will
“ convict the person of *Perjury*, you must prove
“ the swearing of the Affidavit.

“ The Attorney-General, perceiving the opinion of
“ the Court, rather than the party should be non-suit,
“ because no Evidence could be given, offered to enter
“ a *N. prosequi*, which the Court said could not be
“ done, because the Jury were sworn; but he insisted
“ upon it, and said he would cause it to be entered.

Vi. Show. 397.
Rex v. James
H. MSS. IV.
L. of Ev. 290.
(50).

“ Information for *Perjury*, in an Affidavit in *C. B.*,
“ made before Commissioners in the *Country*, in a
“ certain Cause depending there, was tried before
“ *Eyre*, and the party convicted. But several Ex-
“ ceptions arising upon the Evidence, he stopped the
“ *Posse* till the opinion of the Court was had upon
“ Motion. The Proof of the Cause depending was
“ only a *Capias* and Warrant thereupon, and Affidavit
“ filed

" filed and allowed : another exception was urged for " the Defendant, that there was no Proof that the " party before whom the *Affidavit* was sworn was a " Commissioner : and the Court held there needs not, " unless you offer something to disprove it on the " other side. It was then suggested, that the proof " was only by Copy of an *Affidavit*, and no proof " that it was the Defendant's : that this is a dangerous " practice: any man may be thus represented, and " subjected, by the fraudulent substitution of his name, " to the penalty and infamy of *Perjury*: the Court " admitted the force of the objection if an *Affidavit* " were to be thus proved singly : but not when it " was regularly introduced by Evidence of a Cause " commenced ; which is very different from imputing " an *Affidavit* to another without establishing a ground " why there should exist one, or shewing a reason for its " being made, that it was used by the party as con- " cerned in the Cause.

V. *supra.*

" This Principle we had occasion early to notice in " its general application even to civil Cases: and by " much stronger reason therefore to criminal: it in- " deed results from the solid and clear Principles of " general Reason, and from the Nature of Evidence " in an abstract and philosophic View.

TITLE VIII.

Allegation or Assignment of Perjury.

" An Information of *Perjury* set forth that the De- " fendant, in giving a Lease and Release in *Evidence*, " dated 15 and 16 July, 1681, executed at *Albemarle* " House, to which Mr. *Stroude* was a Witness, swore " that Mr. *Stroude* was, in the middle of July, 1681, " at *Newenbam*, (*innuendo, Newenbam in Devonshire,*) " whereas in Truth he was not at *Newenbam* aforesaid. " A Verdict was for the King.

L. of Ev. 45.
H. MSS. II.
R. v. Green.
2 Salk. 513.
Mic. 9 W. III.
B. R.
1 Raym. 256.
5 Mod. 342.
S. C.

" But

" But Judgement was arrested: and it was held,

" 1. That *Newenbam* was but an *individuum vagum*
" without the *innuendo*; and might be as well *Newen-*
" *bam* in *Middlesex* as *Newenbam* in *Devonshire*; so that
" it might be consistent that Mr. *Stroude* should be at
" *Newenbam* and at *Albemarle House*, in the middle of
" July.

" 2. That the *innuendo* could not restrain the *in-*
" *dividuum vagum* to *Newenbam* in *Devonshire*: for an
" *innuendo* is no Averment, but only in the Nature of
" a *Prædict*. or, *aforesaid*. It may serve for an Expla-
" nation to point out or ascertain where there is pre-
" cedent Matter; but can never make a new Charge:
" it may imply what is already expressed, but cannot
" enlarge or change the sense of preceding Words:
" so here the Word *Newenbam* did not import *Newen-*
" *bam* in *Devonshire*, and therefore the *innuendo* cannot
" give it that import.

" That whether the Indictment were at *Common*
" *Law* or by Statute, equal Certainty was required in
" the Charge.

" The Cause was removed by Error into the *House*
" *of PEERS*; and the Judgement there was *reversed*:
" contrary, as it seems, to the Opinion and Expecta-
" tion of Lord Chief Justice *HOLT*, and of the
" Reporter Lord Chief Justice *Raymond*.

TITLE IX.

All Perjury is corrupt in a legal and proper Sense.

" It appears that the Form of Charge by which
" *Perjury* is alleged in an Indictment or Information
" for this Offence was misapprehended by the Jury in a
" Case now to be mentioned.

" The Information charged the Defendant with
" wilful and corrupt Perjury; and on a Trial at Bar
" the

" the Jury first found the Defendant guilty of *Perjury*,
 " but not of wilful and corrupt *Perjury*: ROKEBY,
 " the only Judge remaining in Court, asked them
 " thereupon, whether they found for the Defendant:
 " they answering, no; he told them, he could not
 " receive their Verdict, for it was contradictory: and
 " they must find him guilty or acquit him. At length
 " the Foreman informed the Judge, that they had
 " agreed before they came into Court to find the De-
 " fendant guilty of *Perjury*, but not of *wilful and*
 " *corrupt Perjury*; and if that Verdict should not be
 " recorded, then to find him guilty generally; be-
 " cause some of the Jury were not satisfied to find
 " him guilty of *wilful and corrupt Perjury*.

" And in that instance the Court, on the Motion for
 " a new Trial, took occasion to notice the legal Idea
 " of *Corruption*: which is at the same time the phi-
 " losophical import and the classic acceptation of the
 " Term: by remarking, that if the Thing sworn was
 " manifestly false, the Mind must be corrupt; and
 " then there was no need of Evidence of Bribery:
 " which, in other Words, is the clear but too often
 " disregarded Proposition, that all influence drawing
 " aside the mind from the mere consideration of Truth
 " and Right, is a *corrupt* * influence.

TITLE X.

What may be proved in Support of this Indictment.

" We have already seen that Evidence of what a
 " deceased Person swore, at the Trial on which the
 " *Perjury* is assigned, is Evidence to prove the Falsity
 " of the Oath of the Defendant on an Indictment of
 " *Perjury*: and the Reasons upon which this depends.

V. supra, 213.

* *Quæ tametsi Animus adsperrabatur insolens malarum artium,*
tamen, inter tanta vitta, imbecilla etas ambitione corrupta ten-
batur.

Sallustius de

stipio.

B. C. 8.

Ed. L. B. 1677.

" And

TITLE XI.

GENERAL RULES.

“ And here it may be expedient, since the Rules concerning the Reception and Effect of Testimony are of capital importance, and constitute one of the two great Branches of the subject of this Treatise, to notice some Principles of Evidence connected with this Question, of the Veracity of a person giving an Account of any Fact under judicial Examination. The Rules are these:”

32 Mod. 318.
4 St. Tr. 265 to
272.
Fenwicke's
Cafe.
2 H. P. C. 430.
§ 9, 12.
2 Keb. 384.

What a Man that is living has sworn at one Trial can never be given in Evidence at another Trial to support him, though what he has said in Discourse may be given in Evidence to support him: because the same Oath at another Trial is no Evidence of the Truth of any Man's swearing; for if a Man be of that ill mind to swear falsely at one Trial, he may do the same at another, on the same Inducements. But what a Man says in Discourse, without premeditation or expectation of the Cause in question, is good Evidence to support him: but if a Man hath sworn at one Trial different from what he hath at another, this is good Evidence to his Discredit, “ and may become Evidence in proof of *Perjury*. ”

TITLE XII.

Affirmation.

8 G. I. c. 6.
§ 2.
V. *supra*, 264.

22 G. II. c. 30.

“ Quakers making false Affirmation are liable to all the Penalties of *Perjury*.

“ Moravians making Affirmation in any Court or Place in Great Britain or Ireland, where by Law an Oath is or shall be required, and also in the Dominions of the Crown in America, are to be received in Evidence as if sworn in the usual manner: and if

“ con-

“ convicted of false Affirmation, which, if deposed on
“ Oath in the usual form, would have amounted to
“ wilful and corrupt *Perjury*, they shall incur the
“ Pains and Penalties of *Perjury*.

“ Their Affirmation is indeed in the Nature of an
“ *Oath*, only without the concluding Clause; it being
“ thus prescribed by the Act.

V. *supra*, 291

“ *I do declare in the Presence of Almighty God, the
“ Witness of the Truth of what I say.*

TITLE XIII.

Two Witnesses.

“ It has already been noticed that *two Witnesses* are
“ required in proof of this Crime of *Perjury*.

CHAP-

CHAPTER III.

Of SubORNATION of PERJURY.

" *Subornation of Perjury* is an Offence of a complex Nature, including both *Corruption* of others and violation of the Faith to be preserved in Testimony.

^{2 Hawk. 177.} " But to bring the Offender within this denomination (for which the punishment is the same at Common Law, and the Fine by Statute double, of that for Perjury) it is necessary to allege and prove that the Party so suborned did actually *sake* such false Oath.

" Yet the Attempt itself is indictable as a great Misdemeanour.

" A person attainted of *Subornation of Perjury* falls within the Rule of Infamy incapacitating from Testimony. *

* *Repellitur à sacramento dicendo qui Jure fit infamis.*

CHAPTER IV.

Of Extortion.

“ The next Offence to be considered is *Extortion*: ^{2 Inst. 368 b.} “ which is *a great Misprision*, by any Officer wresting
“ or unlawfully taking, by colour of his Office, any
“ money or valuable thing, either not due, or more ^{1 Hawk. 270.}
“ than is due, or before it be due.

“ To prove *Extortion*, the party injured by it is
“ good Evidence.

“ If a Prisoner, charged before any Court having ^{14 G. III. c. 20.}
“ criminal Jurisdiction in *England* or *Wales*, shall be
“ acquitted or discharged for want of Prosecution,
“ the Gaoler shall take no Fee for his Discharge (so
“ that it would be now manifestly *Extortion* so to do)
“ from the said Prisoner: but such sums as have been
“ usually allowed for Fees shall be paid, so they ex-
“ ceed not *thirteen shillings and four pence* for each Pri-
“ soner so discharged, out of the County Treasury,
“ or out of the public stock of any separate District
“ not assessed to the County at large.

“ *James Rouse*, Commissary of the Archdeacon of ^{4 Inst. 336.}
“ *Huntingdon*, in an Information against him for *Ex-*
“ *tortion*, founded on the Statute concerning *Pro-*
“ *bates*, pleaded not guilty, and the Verdict was ^{21 H. VIII.}
“ against him. ^{c. 5.}

“ The *Probate* was not written upon the Testament
“ itself, but upon a Transcript engrossed; and the
“ Question

“ Question was, whether a Fee taken for such Pro-
 “ bate, under these circumstances, were within the
 “ Statute? And the Court were of opinion that
 “ it was.

R. v. Burdett.
 Raym. 149.
 Hilary,
 8 & 9 W. III.

“ *Extortion* may be committed in an Office in the
 “ due Discharge of which public Utility is concerned;
 “ though it regard not the Administration of Justice.

“ The *Extortion* assigned was for taking divers
 “ small sums of money for little stalls in the Market,
 “ and divers great sums for Fines.

“ It was held by the Court, that if the Defendant
 “ erect several stalls, and do not leave the market
 “ people room to stand and sell their Wares, so that
 “ they are forced on that account to hire stalls of the
 “ holder of the Market, it is Extortion to take money
 “ for such stalls: but not, if having room, they
 “ voluntarily hire stalls, at such rent as the owner
 “ shall set on them; for that the Law does not give
 “ them stalls, but only gives them a free and open
 “ market: so that it is not like a *Miller*, where there
 “ is an *ancient toll*, taking more than the Custom
 “ warrants, which is perfect Extortion.

“ The Court held that where a Man be indicted for
 “ taking extor*five* twenty shillings, if one shilling be
 “ proved so taken, it supports the Indictment.

CHAPTER V.

Of CONSPIRACY.

“ CONSPIRACY is the Offence of two or more to pro-
secute an innocent Man, who is accordingly prosecuted :
“ or to do him other Injury, which he accordingly suffers.

Comm. IV.
P. 136, § 15.

“ This comprehends very often *Extortion*, probably
“ *Perjury*, by the parties so conspiring, and almost
“ certainly, if pursued, *Subornation of Perjury*, with
“ regard to the Witnesses, in support of a nefarious
“ attempt to pervert the Forms of Law, and injure,
“ under colour of Justice, the person, the freedom,
“ the reputation of a fellow Citizen.

“ Where the Attempt extends to Life, which is
“ taken away by such means, it becomes a subject
“ more proper for our future Consideration.

“ In the Definition of a *Conspiracy*, two at least *ex*
“ *vi termini* being included, some difficulty has arisen
“ upon these prosecutions, under particular circum-
“ stances.

“ Thus in the case of persons indicted for conspir-
“ ing to ruin a man in his trade as a card-maker.
“ The husband, wife, and servants were indicted for
“ this offence. The Evidence against them was, that
“ they had at several times given money to the ap-
“ prentices of the party who now prosecuted in the
“ Name of the Crown, to put grease into the paste,
“ which had spoiled the cards. It was not proved
“ that more than one was ever present at one time.
“ It was objected, therefore, that there was no Evi-

R. v. Cope.
N. P. cor. Pratt
Ch. J.
Str. 144.
Hil. 5 G.

*Information of a Conspiracy may be laid of a Charge of
an Attempt to commit a Felony.*

" dence of their *conspiring*. But the Court held, that
" the Defendants, being all of a family, concerned
" in the same business, and giving money for the same
" bad purpose, was sufficient proof of a Conspiracy.

Str. 193.
R. v. Kinner-
sley and Moore.
Tr. 5 G.

" An Information was exhibited, setting forth that
" the Defendants, in order to extort money, did con-
" spire to accuse the Complainant of an attempt of
" the *crimen innominandum*. Only one appears; pleads,
" and is found guilty. In Arrest of Judgement it
" was pleaded, that a *Conspiracy* cannot be of less
" than two, and the other Defendant may be ac-
" quitted. But the Court held that this intendment
" should not stay the effect of the Prosecution as to
" the Defendant already tried. It was objected that
" no overt Act in execution of this Conspiracy was
" laid: but the Court were of opinion this was not
" well objected: indeed the public Affirmation appears
" to have been an overt Act.

Cro. Eliz. 191.
2 Lez. 105.
1 Ventr. 323.

" It was also objected, that a Conspiracy to charge
" a person with the *attempt* of this Crime was not
" punishable in the *temporal Courts*: but the Court
" held otherwise on the Precedents and Reason of
" the Case: and he had sentence accordingly. And
" in the *Easter Term* following the other also was con-
" victed, and had Judgement.

E. 18 G. II.
R. v. Eliz.
Nicol.
a Str. 1227.

" The Defendant was indicted for *conspiring* with
" another *unjustly* to charge *W. F.* with a Robbery:
" and for that purpose going before a Justice, where
" the other party swore the Robbery. She pleaded
" not

*Indictment of Conspiracy good where the Charge is from
a Motive of Malice and Extortion, though it be not
such a Charge as necessarily implies an indictable
Offence.*

675

" not guilty: but the Jury found her guilty; and
" found also that the Co-defendant died before the
" Indictment was preferred. On Exception taken,
" the Court determined the Conviction to be good:
" and noticed the much stronger Authority of *Kin-
nerfley's Case*, where there was a possibility of a
" Verdict of Acquittal as to the other Defendant.

" But the Rule so far holds that if all the Defen-
" dants are acquitted, except one, this amounts in Law
" to the Acquittal of that one also: and it hath been
" holden that such an Indictment will not lie against
" Husband and Wife, they being esteemed but as one
" person.

¹ Hawk. 292.

" An Indictment was found at the Sessions against
" the Defendant and two others for a Conspiracy.

R. v. Rispol.
Tr. 2 G. II.

" The Indictment set forth that the Defendants,
" wickedly and maliciously intending to aggrieve one
" J. C. and to deprive him of his good name, credit,
" and reputation, did conspire, falsely, and without
" any reasonable or probable Cause, to accuse the
" said J. C. of having lately taken out of a bag a
" quantity of human hair, the property of one of the
" Conspirators. There was also a Charge of Money
" extorted under this pretence by means of the said
" Conspiracy.

³ Burn. Mansf.
1320.
Bl. R. 368.

X x 2

" On

“ On the Indictment being removed by *certiorari*,
“ it was objected that the Sessions before which Court
“ it was tried had no Jurisdiction on this subject. But
“ the Court was of opinion they had, upon general
“ principles, it being a Trespass tending to a breach
“ of the peace.

“ The other Objection was, that the Charge did
“ not amount to the accusation of a Crime, such as
“ would support an Indictment of Conspiracy. But
“ the Court held, a Charge, operating to the Discre-
“ dit of a Man, and adapted to the purpose of ex-
“ torting money from him under a false imputation,
“ was sufficient to maintain such Indictment.

CHAPTER VI.

Of CORRUPTION or BRIBERY.

“ *BRIBERY is the Offence of offering or accepting a Gift to influence the Conduct in a Matter which concerns the Right of others.*

“ It may be and frequently is connected with the Crime of *Perjury*; and sometimes of *Conspiracy*.

“ Its most usual and dangerous Province is that of the Election of *Members* to represent the Community in *Parliament*; of which see a Statute of the late Reign, wholesomely appointed to be read every ^{2 G. II. c. 24.} *Easter Quarter Sessions.*

“ The Crime is complete by the *Attempt*: and Evidence of a Bribe tendered, though rejected, is therefore sufficient.

“ Nor is it material, if the party bribed vote contrary to the Bribe; for this cannot be given in Evidence to exculpate either: a *Loan*, on such occasion, is in reality *Bribery* by *Gift*.

“ It is not material to prove a Bribe to vote for all the Parties for whom the Bribe is charged to have been given.

“ Nor needs it to be proved that the parties for whom the Bribe was given were Candidates on the Poll.

“ Nor that the Persons bribed were actually *Voters*.

“ The Punishment by popular Action, as given by the Statute, is but *accumulative*; and an Information or Indictment at Common Law is still open.

Dickson v.
Fisher.
4 Burr. Mansf.
2267--70.

" The Plaintiff on the Statute declared on a Precept to proceed to Election delivered to the Mayor of Colchester: on the Face of the Precept the Words, and Commonalty, appeared to have been inserted and struck through, though still legible.

" The Defendant offered *parol* Evidence to prove that these Words were in the Precept, and not obliterated when delivered to the Mayor, and when returned by him to the Sheriff.

" Two Points were made for the opinion of the Court:

" 1. Whether the Instrument sufficiently proves the Declaration?

" 2. Whether the *parol* Evidence was admissible?

" The Court was of opinion, that the *parol* Evidence was not admissible against the Record: and that as the Precept was to be delivered to the returning Officer, the Words and Commonalty were surplusage, and could no way affect the Declaration.

Grey v.
Smythies.
4 Burr. Mansf.
2273.

" The time of delivering the Precept is not material against a third Person, and delivery may be proved therefore by any Witness present: but where it is material, as against the returning Officer, there it must be proved by a Witness to the Instrument.

Sutton v.
Bishop.
4 Burr. Mansf.
2285.

" Under this Statute the person taking the Bribe is admitted as a Witness to prove the Bribery.

Selby v. Eu-
ming, 2469.

" The Action of Bribery being in its object so analogous to an Indictment or Information, we have referred it to this Division of Evidence in criminal Cases: more especially as the Crime remains indictable.

C H A P T E R VII.

Of MALICIOUS MISCHIEF.

" In treating of this offence, which stands deservedly amongt the *Misdemeanors* nearly bordering on capital offences, and in particular instances is made capital, either on the first or second Conviction recorded against the Delinquent, we are to confine ourselves, in this Section, to Crimes short of Felony: of these the Enumeration will be but brief: for unfortunately the extreme penalty is annexed to most of these Cases; and consequently the offence too often escapes its proper punishment by being made liable to one which few can permit themselves to enforce; being either withheld by humanity, or by a Deference to the public sentiment.

" *Malicious Mischief* is an injury done to the property of another,—not falling under some more specific Denomination,—either from the wantonness of a bad disposition, or from particular and deliberate revenge.

Comm. IV.
P. 244.

" To set fire to any goss, furze, or fern, in any forest or chase, is liable to a penalty of five pounds on conviction before a Justice on the oath of a single Witness; subject, for default of payment, to commitment to the common gaol, for any time not exceeding three, nor less than one Month.

28 G. II. c. 19.
§ 3.

4 & 5 W. III.
c. 23. § 11.

“ And by an earlier Statute, with a view to the preservation of Game, it is enacted, that if any person should burn any grig, ling, heath, furze, gofs, or fern, between Feb. 2, and June 24, on any mounds, hills, heaths, moors, forests, chases, or other wastes, he is subjected to a commitment to the house of correction, to be whipt and kept to hard labour for any time not exceeding one month, or less than ten days. But the Clause is worded with remarkable negligence.

37 H. VIII.
§ 4.

“ Burning a Wain or Cart laden with coals, or with any goods or merchandize, is subjected to a restraint partaking of a civil and criminal nature, treble damages to the party, and a fine of ten Pounds to the King. The same provision is made against burning any Wood, the property of another, prepared or to be prepared for making Coals, Billets, or Tall-wood.

SECTION III.

Of MALICIOUS MISCHIEF, clergyable.

“ Those species of malicious Mischief are now to be considered which the Legislature has thought it expedient to place in the Class of *clergyable* Felonies.

6 G. III. c. 36,
48.
13 G. III. c. 43.

“ Wilfully to spoil or destroy any Timber, or other (specified) Trees, Roots, Shrubs, or Plants, is, for the two first Offences, made liable to pecuniary punishments: but for the third, if in the day time, or even for the first if in the night time, the Offender is pronounced guilty of *Felony*, and to be transported for seven years.

1 G. I. c. 48.

6 G. I. c. 23.
§ 11.

“ Maliciously to set on fire any Underwood, Wood, or Coppice, is made a *clergyable* Felony.

“ Assaulting persons in the streets, with an intent to tear, cut, deface, spoil, or burn their cloaths; or actually so doing:—this took place after some dreadful mischiefs arising from the malicious use of *Aqua fortis* for this purpose.

CHAPTER II.

Of MALICIOUS MISCHIEF not clergyable.

“ We now begin to consider some species of those
“ offences to the first Commission of which DEATH
“ is annexed.

“ Cutting down and destroying ~~Trees~~ planted in an
“ Avenue, or growing in a Garden, Orchard, or Plan-
“ tation, for ornament, shelter, or profit, is made a
“ Felony without Clergy.

9 G. I. c. 22.

“ Dr. BURN, in his valuable Work, has observed
“ that the being armed and disguised in the manner
“ specified in the Act does not seem to enter into the
“ Constitution of the Offence described by the Sta-
“ tute, as to this and some other criminal Acts to be
“ enumerated under this head, but to offences prece-
“ dently specified by the Act; consequently it follows
“ that the Indictment needs not to aver, nor is any
“ Evidence required to prove, that the persons destroy-
“ ing Trees so circumstanced as described were armed
“ or disguised: and so of other offences to be noticed
“ hereafter. It appears indeed, that being in the high
“ road armed and disguised, or in a forest, chase, park,
“ paddock, common, or down, so armed and disguised,
“ is made a substantive Felony without Clergy by the
“ Act: but not necessary to be given in Evidence with
“ regard to several offences under the Act which are
“ independent of it.

I. J. P. p. 226,
7.

9 G. II.
R. v. Baylis
and Reynolds.
Ca. in T. of
Ld. Hardwicke,
291.

“ Another

" Another of the offences made capital Felony by
 " this A&t is, unlawfully killing, maiming, or wound-
 " ing any *Cattle*.

R. v. Paty.

M. 11 G. III.
2 Bl. R. 721.

24 G. II. c. 6.
25 G. II. c. 34.

" The Defendant to an Indictment for this offence
 " was capitally convicted for maliciously and feloniously
 " shooting and killing one *Mare* and *Colt*. In Arrest
 " of Judgement it was moved, that the *Mare* and
 " *Colt* should have been averred to have been *Cattle*
 " within the Statute, if they could be brought within
 " that description duly by Averment. But that, se-
 " condly, they were not necessarily to be comprised
 " under that description: and they referred to Statutes
 " on a like subject; where, when the first had made
 " it Felony to steal *Sheep* or other *Cattle*, a second was
 " passed to explain what *Cattle* were meant.

" On these Objections, BLACKSTONE, who tried
 " the Prisoner, respited the Judgement till the next
 " *Affizes*: and the Case was laid before all the Judges
 " at *Serjeant's Inn*: who were unanimously agreed that
 " as a preceding Statute had made the stealing of
 " Horses in the Night a single Felony, this was to be
 " considered as an Extension of that Statute: and
 " some Precedents were cited of capital Convictions,
 " but none of Executions under this branch of the
 " Statute.

" Judgement of Death was accordingly passed upon
 " him: but he was reprieved for Transportation, and
 " afterwards received a free Pardon.

" Setting

- “ Setting fire to any barn or outhouse (where it 9 G. I. c. 22.
“ would not come within the offence of *Houseburning*
“ hereafter to be explained) or to any hovel, cock,
“ mow, or stack of straw, corn, hay, or wood ;
“ Wilfully and maliciously shooting at any person *Ibid.*
“ in any dwelling-house, or other place ;
“ Breaking down the head or mound of any fish- *Ibid.*
“ pond, whereby the fish shall be lost or destroyed ;
“ Unlawfully and maliciously cutting any hop- 6 G. II. c. 37.
“ binds growing on poles in any plantation of hops ; 31 G. II. c. 42.
“ Setting fire to any mine, pit, or delph of coal
“ or cannel coal ;
“ Unlawfully and maliciously breaking down or 6 G. II. c. 37.
“ cutting down the bank of any river, or any sea
“ bank, whereby any lands shall be overflowed or
“ damaged. § 5.
“ To send any *Letter* without a Name, or signed 27 G. II. c. 15.
“ by a fictitious Name, threatening to kill any person,
“ or to burn their houses, out-houses, barn, stocks of
“ Corn or Grain, Hay or Straw, is *Felony* without
“ Clergy.
“ Upon this *Act* a Question has arisen, whether a
“ threatening Advertisement, painted on a board, and
“ fixed up publicly on a Post, be within the Statute ;
“ and, if recollection err not, it has been determined
“ that it is *not*.
“ Destroying particular *Bridges*; as specified by se-
“ veral *Acts* of Parliament; or damaging them in
“ the manner by those *Acts* particularly expressed :
“ *Turnpikes*, destroying ; or pulling up or levelling
“ the post, rail, wall, bar, or fence ;
“ Burning *wind-mills* or *water-mills*.
“ Some other instances might be added; but we
“ proceed to the consideration of a Crime on which
“ unhappily many points of Evidence have arisen.

London.
31 G. II. c. 10.
§ 6.
Westminster.
9 G. II. c. 29.
§ 5.
Fulham.
12 G. III. c. 36.
§ 3.
8 G. II. c. 20.
9 G. III. c. 29.

CHAPTER III.

Of FORGERY.

Comm. IV.
c. 27. p. 247.

“*Forgery is the making or altering of a Writing or Stamp, tending to the prejudice of another in respect of property.*

2 G. II. c. 25.
F. Cr. L. 116—9.
R. v. A. Lewis.

“*Anne Lewis was indicted upon the Statute, for feloniously uttering and publishing a certain false, forged, and counterfeited Deed, purporting to be a Power of Attorney from Elizabeth Tingle, administratrix of her father Richard Tingle, deceased, late a marine belonging to his Majesty's ship the Hector, to F. P. empowering the said F. P. to demand and receive all prize-money due to her, with intention to defraud Edmund Mason.*

“*The Prisoner was convicted: but a doubt arose, on the suggestion of Sir M. Wright, whether, as no such person existed as Elizabeth Tingle, the daughter of Richard Tingle, he dying childless and unmarried, the Prisoner could be lawfully convicted of a Forgery within this Statute.*

3 Inst. c. 75.
p. 169.

“*The doubt arose from what is said by Lord Chief Justice COKE of this Crime: that it is properly taken when the Act is done in the name of another person.*

“*From whence it was inferred this being done in the name of no person who had ever existed in rerum natura, was not within the Description of the Crime.*

“*It was admitted by the learned Judge, that an alteration made in a Deed really executed, in order to give it an operation different from the meaning of the parties, if done *mala fide*, and with intent to defraud, will come within the legal notion of Forgery,*

" gery, whether it respect the date, the sum, or the
 " premises meant to be secured, or in any other way is
 " contrived for working a change in the interest
 " meant to be conveyed: for it then clearly comes
 " within the description of the offence, and the terms
 " used, *false making*, both under the Statute of *Eliza-* 5 *Eliz. c. 14.*
 " *beth*, and the Statute upon which this Question
 " arises: but that in these Cases there is a real Deed
 " upon which the Forgery may operate: and that so
 " there must be a real person by whom the Deed might
 " by possibility have been made.

" But of eleven Judges present at Lord Chief 1754
 " Justice RYDER's Chambers, ten were agreed that
 " the Case of the Prisoner was within the Letter and
 " Meaning of the Act: and in this opinion Chief
 " Justice WILLES, who was absent, signified his con-
 " currence by a Letter read at that Meeting.

" The Reasons on which they founded their opinion
 " were, that Lord COKE's description of the offence
 " is apparently too narrow, not comprising Cases con-
 " fessedly within the legal notion of *Forgery*.

" That the offence described in the Act, and com-
 " mitted by the Prisoner, is the publishing, as true,
 " a certain false, forged, and counterfeit deed, with
 " an intent to defraud. That the Deed is not less
 " false, because, on account of the non-existence of
 " the person to whom it is imputed, it could not pos-
 " sibly have been true.

" And Judgement of Death was pronounced ac-
 " cordingly in this and other similar Cases which arose
 " while this was in suspense.

" Under the Statute against forging of *Indorsements*'
 " it appeared in Evidence that the Prisoner uttered a

R. v. Hevey.
 O. B.
 Add. Pen. St.
 269.

*Forgery may be committed of a Deed that could not charge
the Person whose Property is supposed to be conveyed
by it.*

“ Bill of Exchange, indorsed *B. Macartey*, and said
“ that his Name was *Macartey*, and that the Indorse-
“ ment was his own hand-writing: but it was proved
“ to be the hand-writing of *Macartey*: it was agreed
“ therefore by the Judges that he must be acquitted of
“ the Forgery.

^{3 Inst. 171.}
^{2 Hawk. 187.}
^{2 H. H. P. C.}
685.

“ If *A.* tell *B.* that a writing is forged, and *B.*
“ notwithstanding utter it, *B.* is in danger of the Sta-
“ tute: for it is strong, though not conclusive Evi-
“ dence of *B.*'s knowing it to be forged.

“ It is immaterial whether the instrument forged
“ could possibly by Law take effect according to its
“ avowed purport, if it is falsely made with an intent
“ to defraud.

R. v. Japhet
Crooke.
Str. 901.
5 Eliz. c. 14.

“ Thus where *Japhet Crooke* was indicted on the
“ Statute for forging a Lease and Release; the Indict-
“ ment set forth that *A. B.* and his Wife were seised
“ in fee of certain messuages, &c. called *Jawick*, in
“ the parish of *Clackton*, in the county of *Essex*: and
“ that the Defendant, intending to molest them and
“ their interest in the premises, forged a Lease and
“ Release as from them, whereby they are supposed to
“ convey to him, for a valuable consideration, all that
“ park, called *Jawick Park*, in the parish of *Clackton*
“ in *Essex*, containing eight miles in circumference,
“ with all the deer, woods, &c. thereto belonging.

“ It was objected, that the premises, thus supposed to
“ be conveyed, were so materially different from those
“ really the estate of *A. B.* and his wife, that it was im-
“ possible the conveyance ever could molest or disturb
“ them: but the Court (RAYMOND, Chief J.) were
“ at length unanimously of opinion to over-rule the
“ objection:

“objection: for that it is not necessary there should
“be a charge or a possibility of a charge.

“The same appears to be the Case with regard to
“the Statute, upon which Forgeries of Deeds and
“Wills are now generally tried.

“And there was a Case in 1775 of a Person tried; O. B. 1775.
“convicted, and executed, for the Forgery of a War- P. 440. C. 736.
“rant or Order to receive *non existent* Lots of the *East*
“*India Company*, which Warrant he had used with a
“view to receive a Loan of Money; for, though it
“could not defraud the *East India Company*, who had
“no Lots to which it was applicable, it was a *Forgery*
“with intent to defraud the person who might be
“induced to make a Loan upon it.

“On an Indictment on the Statute for feloniously R. v. Mary
“uttering and publishing a certain false, forged, and Mitchel.
“counterfeit Warrant and Order for the Delivery of F. Cr. L. 119.
“Goods, purporting to have been signed by one *George*
“*May*, knowing the same to be false, forged, and
“counterfeited, with an intent to defraud one *William*
“*Jeffereys* of the several Goods mentioned in the
“Order, the Defendant was found guilty: but
“Mr. Justice *Foster* respite Judgement, upon a
“doubt whether the Order set forth in the Indictment
“be such Warrant or Order as brought the Prisoner’s
“Case within the Statute.

“The Prisoner went as a person intitled to paro-
“chial relief from the parish of *Maidstone* to the
“shop of the said *William Jeffereys*, who sold Women’s
“apparel: and pretending she came from the said
“*George May*, who was then Overseer of the Poor for
“the said Parish, produced an Order set forth in the
“Indictment:

“Mr.

" Mr. JEFFEREYS,

Oct. 16, 1753.

" I desire you to let this Woman have six yards of or-
" dinary stuff, one pair of stockings, one shift, one apron,
" one handkerchief, and I will see it all paid for. Wit-
" ness my hand,

GEORGE MAY.

" The objection was, that supposing it genuine, it
" could have been considered in no other light than as
" a request from May for a delivery of goods on
" credit, and an undertaking, on his part, to see
" them paid for.

5 July, 1754.

" On a conference of the Judges at the Chambers
" of Lord Chief Justice RYDER, nine were clearly
" of opinion that this is *not* a Warrant or Order for
" the delivery of goods within the meaning of the
" Act: one doubted, but acquiesced; another dis-
" sented: Mr. Baron LEGGE was absent.

" Those that took the Case to be out of the Act
" argued, that the Words *Warrant or Order* are ex-
" pressive of one and the same idea; and import, that
" the person giving such Warrant or Order hath, or
" claimeth to have, an interest in the money or goods
" which are the subject of that Warrant or Order; a
" disposing power over them: and that though the
" present, and many other cases, may come within the
" mischief meant to be prevented, yet that in the
" construction of Acts so highly penal, it was neces-
" sary not to depart from the old rule of adhering
" strictly to the Letter.

" The

" The learned Judge who dissented argued, that
" the Act on which the Question ariseth was made on
" purpose to take in cases not within the former, and
" thereupon ought to have a liberal construction:
" that the word *order* is every day used among tra-
" ders in a yet larger sense: that had the Paper been
" genuine, and the goods delivered upon credit, *May*
" would have been liable; or, had they been delivered
" under the circumstances of this Case, *Jeffreys*
" would have been defrauded: and he concluded, that
" the present Case being within the mischief, and, as
" he apprehended, within the words also of the Act,
" Judgement of Death ought to pass upon the
" Prisoner.

" At the next *Affizes* she was called to the Bar, and
" discharged from the Indictment.

" It hath been said, a Man may be a Forger of his
" own Deed: as if he make a Feoffment of his Lands
" to *A. B.* and afterward *antedate* a Feoffment of the
" same Lands to *C. D.* It does not appear there has
" been any Decision on this point since *Forgery* has
" been indictable, in the first instance, as a *Felony*: and
" it now ceases, in almost any instance, to be suable as
" a Misdemeanour: such is the Change of our Po-
" licy since the Statute * of the *Fifth Henry*. The
" Statute of *Elizabeth* led the way to the Alteration,
" by rendering Forgery of Deeds Felony on the second
" offence. || A Statute § of the late King made this
" species of Felony capital without Clergy in the first
" instance: and the same Penalty was soon annexed to
" the several Forgeries affecting commercial Interest
" and personal property.

* 1 H. V. c. 32
Anno 1413.

|| 3 Inst. 169.
§ 2 G. II. c. 25.
Anno 1729.

TITLE II.*Averment, what sufficient.*

R. v. Powel.
2 Bl. R. 787, 8.

" As follows is a sufficient Averment of the Tenor
" of a forged Receipt,

" It is sufficient to aver generally an intention to
" defraud; which may be proved at the Trial by
" Evidence of the particular Facts.

R. v. Birch and
Martin.
2 Bl. R. 790.
M. 12 G. III,
C. P.

" It was contended that Evidence could not be
" given of a Forgery under an Indictment which
" charged the Parties with *forging a Paper Writing*,
" *purporting to be the Will of A. B.* for that it should
" have been, *forging the last Will*: but the Court did
" not allow an objection which in reality contended,
" that the Indictment was bad for charging the Fact
" truly and properly, instead of charging it so as in
" strictness of expression to amount to an impossibility.

CHAPTER IV.

*Of COINAGE, and other Offences relative to the Coin
not made Treason by Statute, but capital Felony.*

“ It is here only intended to mention some Points to
“ which Evidence may most probably apply.

“ Persons uttering or tendering false Money, knowing
“ it to be false, are subjected, on the third offence, to
“ Felony without Benefit of Clergy.

“ And with regard to the *Evidence* by which a Re-
“ petition of this Crime is to be proved, it is pro-
“ vided by the same Statute, that if any person, ut-
“ tering or tendering any false or counterfeit Money
“ as aforesaid, shall afterward be guilty of the like
“ offence in any other County or City, the Clerk of
“ the Assize, or the Clerk of the Peace for the County
“ or City where such Conviction was so had, shall, at
“ the Request of the Prosecutor, or any other on his
“ Majesty’s behalf, certify the same by a Transcript
“ *in a few Words,* † containing the effect and tenor of
“ such Conviction; and such Certificate being pro-
“ duced in Court, shall be sufficient Proof of such
“ former Conviction.

“ Persons *counterfeiting Copper Money, halfpence or*
“ *farthings, or buying, selling, taking, paying, or*
“ *putting off such Money under the Value which by*
“ *its Denomination it imports, are made Felons.*

“ Consequently on the second offence, if the Re-
“ cord be given in Evidence, no lay person can have
“ the Benefit of Clergy: and one *W. Marston Roth-*
“ *well* was accordingly, on the 12th of *September,*
“ 1783, at the session at the *Old Bailey*, convicted,
“ and had Judgement of Death: it being proved his
“ second offence.

15 G. II. c. 24
§ 9.

11 G. III. c. 40

Rothwell's
Cafe.
Add. P. St.
122.

† Rather negligently expressed in a capital Case, and not very con-
sistently with the Word Tenor.

CHAPTER V.

Of LARCENY.

Comm. IV.
Ch. 17. p. 229,
etc.

" *Larceny is the Offence of taking and carrying away, with the Intent of stealing, the personal Goods of another.*

" *It may either be simple or compound.*

" *Simple Larceny is the taking the Goods of another with a felonious Intent, without Force; and neither from the House nor Person.*

" *It may be either Grand or Petit.*

Comm. IV.
238, 9.

" *Grand, if laid and found by the Verdict to the Value of above twelve pence; petit, if beneath that Value: though, if the Charge and Finding exceed that sum, simple Larceny yet remains a clergyable offence; except in those instances where Statutes have intervened to the contrary.*

Par. 2.

Of Taking.

" *The taking and carrying away is to be considered as one Act: of which the carrying away evidences and executes the intent of the taking.*

Fest. 123.

" *By the taking is understood some Act of Usurpation of Property not grounded on the notion of legal Right, and not included in the Act of the Owner: for if otherwise, in the one Case it is a Trespass, in the other a Breach of Trust: but in neither a Felony, unless expressly so made by Statute.*

" *The*

“ The party, however, when he excuses the taking
 “ under a legal Right, must appear to have acted
 “ under such circumstances, that he did not merely
 “ avail himself of the Law as a pretence, but had
 “ an Idea of a legal Claim: otherwise a taking, under
 “ *Process of Law*, may be given in *Evidence as a fe-
 “ lonious taking* against the party thus wilfully abusing
 “ the Process.

v. *infra.*

“ And thus saith COKE: if a man seeing the horse ^{3 Inst. 108.}
 “ of B. in his pasture, and having a mind to steal
 “ him, cometh to the Sheriff, and pretending the
 “ horse to be his, obtaineth the horse to be delivered
 “ unto him by a *Replevin*: yet this is a *felonious tak-
 “ ing*; for the *Replevin* was obtained *in fraudem
 “ legis.*

“ And thus where a man, who was an Attorney,
 “ had obtained a fraudulent Judgement in *Ejectment* <sup>2 Sid. 254.
 R. v. Farr.
 P. 17. Car. II.</sup>
 “ where he had *no Colour of Title*, and took goods
 “ in the House to a considerable Value; it appearing
 “ in Evidence that he sued out the Ejectment merely
 “ to get possession, and convert the Goods, to which
 “ he had no pretence of Claim, to his own Use, he
 “ had Judgement of Felony: and (having once had
 “ the benefit of Clergy allowed him for *Forgery*) he
 “ was executed.

“ It seems clear that a Man may commit a Felony
 “ of his own Goods by reason of the special tempo-
 “ rary property of such Goods vested by himself in an-
 “ other, and the felonious intent. As if A. deliver Goods
 “ to B. to keep, and steal them, with *intent* to charge

F. Cr. L. 123.
 H. H. P. C.
 513.

Y y 3

“ B. with

7 H. VI. 43 a.

"B. with the Value: or if A. having delivered
 "Money to his servant to carry to some distant Place,
 "disguise himself, and rob the servant with intent to
 "charge the hundred; or take them secretly from
 "the servant with intent to make the servant answer-
 "able for the Loss. And agreeably to this Doctrine
 "the Law seems to have been understood above three
 "Centuries past.

O. B. Dec.
 1778.
 No. 52.
 R. v. Ann At-
 kinson.
 Add. P. St. 376.

"On an Indictment for stealing ten Guineas, the
 "property of Joseph Wood, the Evidence was the
 "Wife of Joseph Wood, and the account she gave
 "was this: that being in want of change, to pay
 "some workmen, the Prisoner told her she knew a
 "person who could give her ten guineas worth of
 "half-guineas: that she put down the Guineas on the
 "Table, which the said Prisoner took up, and under
 "pretence of going for change, went out, and never
 "returned: on searching for her Cloaths, it was found
 "they were gone. On this Evidence she was found
 "guilty.

R. v. W. Van-
 fos. O. B. 1779.
 Add. P. S. ut
 supra.

"On an Indictment for stealing a silver Watch, the
 "Evidence was, that the Prisoner had been a year and
 "a half Journeyman to the Prosecutor, who had en-
 "trusted him with a silyer Watch to clean: the Pri-
 "soner had brought the Watch back; but it not
 "being perfect, the Prosecutor had sent it to him
 "again. The Owner wanting it, the Prosecutor sent
 "for it to the Prisoner, and received for Answer that
 "it was not done; and on a second message, that it
 "was lent out by the Prisoner, which was found to
 "be a falsehood. In reality, it had been pawned by
 "the

“ the Wife of the Prisoner. He was found guilty.
 “ The Reader will see that the pawning by the Wife
 “ must be understood to have been proved to be by
 “ the direction of the Husband.

“ On an Indictment for stealing a Note, the *Evi-*
 “ *dence* was, that it was delivered to the Prisoner to
 “ discount: and it appearing that the Owner never
 “ meant to part with the Note till the money was
 “ actually paid for it, and that the Prisoner got it into
 “ his possession with an original design of stealing it,
 “ this was adjudged Felony.

“ A Man went to a Goldsmith’s, and ordered a
 “ quantity of Goods to be sent home: the Goldsmith
 “ directed his servant not to leave the Goods without
 “ the Money; but on some pretence the pretended
 “ Purchaser sent back the servant, and kept the
 “ Goods. The Judges held these circumstances to be
 “ Evidence of a felonious taking: as in the Case of a
 “ Ring-dropper, where a man drops a ring or purse,
 “ and, on pretence of dividing its produce, takes a
 “ cloak or some other thing as a pledge for his propor-
 “ tion, and converts it to his own Use, which has been
 “ repeatedly adjudged Felony.

“ If a Carrier, after he hath brought the Goods to
 “ the place appointed, take them away privately, it is
 “ Felony; and so if he carry them to some other
 “ place than the place agreed; or if he open a sack
 “ or bag, and privily take out part of the Contents.

“ If a Guest at a Tavern take Plate set before
 “ him, this is *Felony*, for there is only a special Use.

R. v. J. H.
 Aikley. O. B.
 1783 and 1784.
 p. 294.

R. v. Sharpless.
 O. B. 1783 and
 24. p. 293.
 Ibid.
 Add. P. S.
 251.

Add. P. S. 252.

3 Inst. 108, 9.
 13 E. IV. 9.

3 Hawk. 90.

" And if a *Miller*, who hath corn delivered to him
" to grind, steal part, this is *Felony*.

Shaw.

" If a tradesman deliver goods to workmen to work
" in his house, and they steal away part of them,
" this is *Felony*, notwithstanding the delivery to the
" party; by reason the property is not altered by the
" delivery.

*Par. 3.**Of Horse-stealing.*37 H. VIII.
c. 8. § 2.
Anno 1545.

" There is a Case of *Larceny* made capital *Felony*
" by Statute, which is *Horse-stealing*: the theft here
" may frequently take place in consequence of a de-
" livery from the Owner; yet *Evidence* of such de-
" livery for a *special purpose* does not clear the *Felony*.

V. O. B. 1783
and 1784.
p. 293.

" Thus a man takes an horse under pretence of
" taking a journey into *Essex*: this journey he never
" takes, but sells the horse: by all the Judges it has
" been determined *Felony*.

R. v. Macken-
zie.
Add.P.S.231,2.
O. B. 1779.
p. 365.

" *Mackenzie* went to *Spencer*; and after looking at
" a horse, desired to know whether he would go quietly
" with the saddle on. *Spencer* delivered the horse for
" the purpose of trying him; *Mackenzie* rode away
" with him: this was adjudged *Horse-stealing*.

1 E. VI. c. 12.
§ 10.

" It was a doubt whether the general Terms of a
" subsequent Statute had not restored *Clergy* to the
" stealers of a single Horse: to obviate which it was
" declared and enacted that stealing of a *single Horse*,
" *Gelding*, or *Mare*, is deprived of *Clergy*.

2 & 3 E. VI.
c. 33.*Par. 4.**Of carrying away.*V. *infra*, 703,4.3 Inst. 308.
22 Aff. pl. 39.

" What shall be *Evidence* of carrying away in sup-
" port of an Indictment of *Larceny* may be collected
" from the subjoined instances, and will yet more
" appear in treating of *Larceny from the person*.

" A Guest took the Coverlet or Sheets off his bed,
" and rising before day, removed them out of the
" chamber where he slept, into the hall, and went into
" the

“ the stable to fetch the horse, and the ostler apprehended him: these several Acts were judged Evidence of a felonious intent: and that there was a carrying away by removing the coverlet from the chamber into the hall, although it still were in the house of the owner.

Par. 5.

Who shall be said to have the Property in certain Cases.

“ He who steals goods belonging to a Parish Church ^{1 Hawk. 94.}
“ may be indicted for stealing the Goods of the Parishioners.

“ And of those who violate the decent Respect due to the remains of Mortality, there is the following Case relative to the legal consideration of their offence.

“ At the Assizes at Leicester, the Defendant, who had digged in the night into the graves of several men and one woman, and taken away the winding sheets from the bodies, was indicted of Felony: the Judges, who had been previously consulted, as was the fashion in those days, holding that there was a property in the sheets, in the Executor, Administrator, or other Owner, sufficient to maintain the Indictment. The Jury found him guilty of petit Larceny only.

R. v. Haines.
10 Ja. I.

Par. 5.

Things appertaining to the Realty not larcinable.

“ The Things taken away must be personal Goods: and therefore, where Statutes have not interposed, things adhering to the freehold, and removed in the instant of their severance from it, are not the subject of Larceny. But if previously severed by the owner, they are: and so if the Evidence establish their being severed at one time by the Thief, and taken, after an interval of remaining severed, at another.

IV Comm. 232.
3 Inst. 109.
1 H. H. P. C.
509, 10.

“ On

IV. Comm.
234.

" On the same Principle the stealing of *Writings*,
" containing the Title of an Estate, has been held
" no *Felony*, but a *Trespass*: because they are not per-
" sonal Goods of intrinsic Value, their worth being
" merely as they respect the *realty*.

R. v. Westbeer.
2 Str. 1133.
Tr. 13 G. II.
B. R.

" And agreeably to this Rule was the Case where
" one was indicted of *Larceny* in stealing a *Commission* to
" settle Boundaries, and the *Return* thereupon: which
" Commission and *Return* were respectively laid to be
" of the Value of two *Sbillings*, of the *Goods* and
" *Chattels* of the King. The Defendant pleaded, *Not*
" guilty: the Jury found two parchment writings an-
" swering the description in the Indictment: and that
" the Prisoner *privately* carried them from the *Six Clerks*
" *Office* in *Middlesex*, belonging to the Court of *Chan-*
" *cery*, where they were kept as *Records* of that Court,
" with an *intent* to *steal* them: that they were the
" King's *Goods*, and each of the Value of one penny.
" And upon the whole Matter, whether the said taking
" were *felonious*, they submit to the Judgement of
" the Court.

* Sir Dudley
Ryder.

" It was contended by Mr. Attorney General* and
" Mr. Barnardiston, that this was *petit Larceny*, both
" on the general Idea of the Offence and the particular
" nature and circumstances of these parchments as
" applied to that Idea.

" That it was a fraudulent taking without consent
" of the Owner; * the private taking and the property
" in the King being ascertained by the Indictment,
" and a Value found which reduced it to *petit Larceny*.

* *Latrocinium est fraudulenta contrectatio rei alienæ invito Domino.*

" That the Crown, in behalf of the Community, is
 " recognized by Law as having a valuable property
 " in these instruments: and that the place where they
 " are deposited has the appellation" of the Treasury †
 " for that reason.

V. Gilb. L. of
 Ev. form. Ed.
 p. 8.

" That whatever might be said of Deeds between
 " party and party, as *favouring* of the *Reality*, and how-
 " ever necessary it might be to allow, on a subject of
 " this nature, a Doctrine once settled by Precedent,
 " though originating in a Refinement of which it
 " might be difficult to give a satisfactory Reason, *pub-*
lic Instruments were not included within the Principle
 " of that Rule.

4 Inst. 71.
 H. H. P. C.
 650.
 8 H. VI. c. 22.

" That the Statute concerning the stealing of *Records*,
 " whereby any Judgement should be reversed, rather in-
 " dicated than excluded the Idea that the stealing of
 " Records was a Felony at Common Law: for that
 " the Statute was necessary, if Clerks, being intrusted
 " with the possession, were to be on an equal footing of
 " Punishment with other persons, supposing this to be
 " Felony before by Common Law in a Stranger.

" On the contrary, it was argued, that the Statute
 " was to be considered as introducing a new Law, in
 " particular circumstances, on a subject for which the
 " Common Law had made no general Provision. That
 " this clearly was not within the Act: and that evidently

+ Lord Coke, in the Passage
 to which the Margin above re-
 fers, has these expressions:

The King's Treasury—this
 Treasure is twofold: his Money
 or Coin; and another that is far

more precious and excellent, and
 those be the sacred Judgements,
 Records, and other judicial pro-
 ceedings under the safe Custody of
 the Treasurer and Chamberlains of
 the Exchequer.

" it was to be governed by the Principle of Deeds
" favouring of the Realty.

" The Court declined entering on the Question,
" whether these Writings were said properly to be
" Goods of the King, or on the general Question upon
" the Statute, or of the extent and nature of the Crime
" of stealing Records at Common Law. But that
" the point of these writings concerning the realty was
" sufficient to ground their Judgement: and they all
" declared their opinion that the Prisoner was not
" guilty of Felony as charged in this Indictment.

" Neither did they think it legally justifiable to con-
" vict him, upon this finding of the Jury, of a Tres-
" pass, the Indictment being for a *Felony*.

3 Inst. 109.
Wody's Ca-
tor, omn. Just.
in Cam. Sac.
30 E. IV. 14.

" And where Felony cannot be committed of
" Charters, it has been held that it cannot be com-
" mitted of a Box containing them: for that it is but
" an Accessary to the Principal, and therefore taken to
" be of the same nature as the Charters themselves.
" Littleton argued that it was Felony: but he seems
" at length to have acquiesced in the opinion of the
" other Judges.

4 G. II. c. 32.
25 G. II. c. 10.
" In the same Predicament formerly was Lead off
" the Roofs of Houses, &c. and out of Lead Mines.

Par. 6.

What shall be said to be Property.

" In order to be liable to the Punishment of *Lar-*
" *ceny*, the property must be such to which the Law
" annexes value. Therefore the stealing of monkeys,
" bears, foxes, or Dogs, is not Felony: though the
" stealing of Dogs is by a late Act punishable, for the
" first offence, by a Penalty not exceeding thirty, nor
" less than twenty Pounds, with the Charges; and on
" non-payment to be committed to the common gaol,
" or house of correction, for any time not exceeding
" twelve, nor less than six months, or until the penalty
" and

“ and charges shall be paid : for the second offence, the
 “ penalty not exceeding fifty, nor less than thirty
 “ Pounds, with the charges ; and on non-payment, to
 “ be committed, not exceeding eighteen, or less than
 “ twelve months, or till paid ; and to be publicly
 “ whipt within three days after such commitment.

“ But there are Animals wild by Nature, which, for
 “ the amusement and state of Princes and great Men,
 “ have, by our ancient Laws, while the Rigour of the
 “ feudal system was in its strength, been considered as
 “ property which might be feloniously taken, as *Deer* in
 “ a Park, reclaimed or confined, *Hawks, Swans*. It does
 “ not appear, that noblest of Birds, the *PEACOCK*, *
 “ stands under this denomination in our Books; though
 “ the *Crest* was used in the old times for the ornament
 “ of our Kings; more suitable perhaps to adorn a beau- 9 G. I. c. 22.
 “ tiful Queen, such as *Mary of Scotland*, being at
 “ once elegant and splendid in a peculiar degree.

“ Of Animals serving for Food, though not tame,
 “ *Larceny* may be committed by stealing their *Flesh*
 “ when dead; and so of the eggs of tame Birds, *Pea- 3 Inst. 109,
 “ bens, Turkies, &c.* 110.

“ Killing *Sheep, Lamb, Bull, Cow, Calf, Ox, Steer,*
 “ or *Heifer*, with an intent to steal, is a Felony without
 “ Benefit of Clergy.

“ And it hath been held that *Larceny* may be com-
 “ mitted by stealing of *Fish* in a Trunk or Pond :
 “ they being then not at their natural Liberty; but as
 “ it were impounded.

“ *Larceny*, it is said, could not at Common Law be
 “ committed of *Treasure trove* till seized by the King,
 “ or him who hath the Franchise: and by *Treasure*
 “ *trove* the Law understandeth Gold, Silver, Plate, or
 “ Bullion, if found hidden in the Earth or other pri-

37 E. III. c. 19.
 Comm. 1V. 236.

14 G. II. c. 6.
 15 G. II. c. 34.
 VI. 5 G. III.
 c. 14.

H. P. C. 94.
 H. H. P. C.
 571.
 IV. Comm. 235.

Comm. I. 295.

H. N. x. c. 20.

* *Invidum bunc Alitem et à veritate alienum. Quin et stoli-
 malevolum quibusdam dicit plati- dum; quā vix alia stultior exco-
 cuit; PLINIO quidem merito re- cogitari poterat sententia. Miremur
 fragante; et est id sane longissime si eundem et deformem dicenter?*

"vate Place, the Owner being unknown; and in this respect the Law does not seem to be altered: and of "Wreck it was holden in like manner that *Larceny* "could not be committed; for which Reason the "Legislature interposed for the restraint of this cruel "violation of social Duty; this unnatural Desertion "of the Principles and Sentiments of Humanity: "and it also punishes as Felony, without Benefit of "Clergy, plundering or stealing from any ship in "distress, though not a wreck.

"And it was necessary to apply the Remedy in this Extent, as otherwise the Provision would have been "very inadequate to the Mischief: for a ship is not "said to be a *wreck*, nor do the goods which were on "board fall under that description but where the ship "is lost, and the goods thrown upon Land: and "then if any Animal escape *alive*, the property was "not held to vest in the Crown till after three Months "non-claim. And afterwards it was understood by "our *Jurists*, that if any certain *mark* were set on the "goods by which the Owner might be known, it is no "wreck: and the Claim progressively becoming yet "more unfavourable, the Statute of *Westminster* first "extended the limitation to *a year and a day*; and at "length it was determined, agreeably, as it appears, "to the sense of *Bacon*, that by *whatever signs* "Property could be proved the Owner was intitled.

"The Statute lately mentioned provides that when "goods of small value shall be stranded, lost, or cast "on shore, and shall be stolen without circumstances "of Cruelty, Outrage, or Violence, that it shall be "lawful to prosecute for such Offence by way of In- "dictment for *petit larceny*: so that if there be Evi- "dence of Violence, Cruelty, or Outrage, goods thus "taken leave the taker subject to the punishment of "capital Felony.

"*Bonds*,

Carta, H. II.
26 May, 1174.

Brad. L. III.
c. 3.

3 E. I. c. 4.

Hamilton and
Smyth v. Davis.
5 Burr. Mansf.
Tr. 11 G. III.
B. R. 2732.
Anno 1774.

26 G. II. c. 19.

“ Bonds, Bills, and Notes, were formerly not larcenable: but they are placed, in this respect, by Statute, on the footing of the Money they purport to represent. This marks the commercial Temper: as we have seen that by the same Statute Notes acquired the legislative recognition of an importance equal to Deeds in Case of Forgery.

“ But though it is necessary there should be a determinate property somewhere, an indictment is maintainable for stealing the goods of a person unknown: for it is the public injury, not the individual loss, which is the ground of the criminal Prosecution.

“ The Wife cannot be guilty of Larceny from the Husband, nor the Husband from the Wife: on account of their Unity of Interest.

“ A Wife cannot be convicted of Larceny committed by her and her Husband: for she is presumed in Law to have acted under coercion from him.

¹ H. P. C. 512.
Comm. IV.
236.

² H. VI.
Cor. 5.

³ Inst. 108.
Stamp. 46. c. 15.
E. II. cor. 383.

TITLE II.

Of COMPOUND LARCENY.

“ We are now to speak of the Evidence proving the Crime of compound or mixed Larceny.

“ And, first, of Larceny from the person.

“ Privately stealing from the person above the Value of twelve pence is a Felony without Benefit of Clergy.

“ On an Indictment for assaulting Albina, the Wife of George Hobart, Esq. and feloniously taking from her person against her Will an ear-ring set with diamonds.

“ The Evidence was, that as Mrs. Hobart was getting into her coach from the Opera House, she felt a person take hold of her ear, and pull her ear-ring, which was thereby separated from her ear: the prisoner was seen by two Witnesses with his hand to

³ Eliz. c. 4.
IV. Comm. 242.

R. v. Lapier.
O. B.
Addington's
Pen. St. p. 375.

“ Mrs.

" Mrs. Hobart's ear. The ear-ring was found after wards in her hair.

" The Judge before whom the offence was tried respite Judgement on a doubt, whether there was a carrying away: the opinion of the Judges was taken; which was, that the Evidence maintained the Indictment.

" What shall be said to be taking from the person is to be farther seen in treating of Robbery.

Par. 2.

Of LARCENY from HOUSES.

23 H. VIII.

c. 1.

1 E. VI. c. 12.

5 & 6 E. VI.

c. 9.

H. H. P. C.

520, 522.

39 Eliz. c. 25.

Tr. 16 Car. II.
Simpson's Case.
H. H. P. C.
527.

" This offence may be committed so as to incur a capital Felony, by stealing above the Value of twelve pence from a Church or Chapel, with or without violence.

" By stealing in a Booth or Tent, in a market or fair, by day or by night, by violence or breaking the same, the Owner or some of his family being therein.

" Not only a stealing, but breaking must be proved: and the Evidence that a stranger was in the booth or tent is not sufficient to support the Indictment.

" Stealing to the Value of five shillings, by breaking any dwelling-house, or any out-house, shop, or warehouse thereunto belonging, in the day-time, and although no person be therein.

" On this Statute there must be some Evidence of Force.

" A man came into a dwelling-house, none being within, and the doors being open, and broke up a Chest, took out Goods to the Value of five shillings, laid them on the floor, and, before he could carry them out of the chamber, he was apprehended: and upon a special finding, he was held by the Starre to be ousted of his Clergy, by the opinion of all the Judges.

" Pri-

" Privately to steal Goods, Wares, or Merchandise,
" in any shop, warehouse, coach-house, or stable, by
" day or by night, and whether any person lie therein
" or not, is Felony without Clergy. The Accessories
" before the Fact are within both this and the Statute
" of Elizabeth.

10 & 11 W. III.
c. 23.

3 & 4 W. & M.
c. 9.

" If force be in Evidence by breaking open, it seems
" this will take the Crime out of the Statute concern-
" ing Shops, Warehouses, &c. from whence Goods
" are privately taken.

Fo. 79.

" Where the Prisoner was indicted for privately
" stealing Goods, the property of Messrs. Fludyer and
" Co. in the Warehouse of John Day; the Case ap-
" peared upon Evidence that John Day kept a common
" Warehouse by the waterside, where Merchants did
" usually lodge Goods intended for Exportation, until
" they should have an opportunity of putting them
" on board. The Goods were sent by Fludyer and
" Co. to this Warehouse, in order to be put on board
" a Vessel; and in the Warehouse were stolen by the
" Prisoner.

R. v. Howard.
O. B. 3 July,
1751.
cor. Parker,
C. B. J. J.
Foster & Birch.
Fo. 77, 9.

" The Court was of opinion, that this is not a Case
" within the Statute; for that by the Word Ware-
" houses in the Statute is meant not mere repositories
" for Goods, but such places where merchants and
" other traders keep their Goods for sale, in the Na-
" ture of Shops, and whither Customers go to view
" them: and though the Goods might with propriety
" sufficient be laid to be the Goods of John Day,
" he having the charge and possession of them, yet still
" his Warehouse was a place merely of safe Custody.

“ Accordingly the Prisoner was found guilty of
“ *Larceny* to the Value laid in the Indictment; but
“ acquitted of stealing privately from the *Warehouse*.

O. A. S. 487.

“ The learned Author of the *Observations on ancient
Statutes* appears not to acquiesce in this Distinction.

Foſt. 79.

“ *Money* appears not to be within this Statute.

12 A. c. 7.

“ Stealing to the Value of *forty shillings* from any
“ dwelling-house or outhouse, whether any person be
“ in the said house or outhouse, or not, and although
“ such house or outhouse be not actually *broken* is
“ *Felony without Clergy*.

§ 26

“ Apprentices under the Age of fifteen are not
“ within this statute.

C H A P T E R VI.

Of ROBBERY.

“ The next species of offences, of which it is necessary to discriminate the Evidence, is *Robbery*:
“ which is the felonious and forcible taking of Goods from
“ the person of another; or, the taking of the property
“ of another, in his presence, by violence or threats, without
“ out the notion of legal Claim.

Comm. IV.
243.

“ There must be a *taking*: for the Assault with
“ intent to rob is now a transportable Felony by
“ Statute.

7 G. II. c. 21.

“ It is of property, *indefinitely*: for the Value
“ makes no difference in the legal Constitution of this
“ Crime.

1 Hawk. P. C.
97.

“ The absolute or qualified owner of the Goods
“ must be *present*: for it is the danger or apprehension
“ to which this Attack renders him liable, which characterizes this offence: and where his presence is
“ such as to come within this consideration, the taking
“ is in Law a felonious taking from the person:
“ though the Goods may not actually be carried
“ about him: as where one drives away the Sheep or
“ other Cattle of another before his face.

“ It must be *by violence or threats*: and the natural
“ concomitant of these being presumably some degree
“ of fear in the party thus assaulted, putting in fear

“ is a circumstance that enters into the legal Description
“ of the Crime: for it is not an essential, so as to
“ form part of the rigorous definition of it.

Tr. 13 A.
Foot. 123, 9.
R. v. Pest.
O. B. 1781.
Add. P. S. 316.

“ And accordingly it was resolved by all the Judges,
“ that although usual, it was not necessary to lay this
“ circumstance, of putting the party in fear, in the
“ Indictment; for that it is sufficient if the Goods
“ were taken by violence. And once so taken, the
“ offence is complete: therefore where the Highway-
“ man stopped the Prosecutor, and demanded his
“ Money, who accordingly gave his purse; but the
“ Highwayman, on receiving it, said, if you value
“ your purse, take it, and give me the money; and
“ accordingly the Prosecutor took it back: yet the
“ possession of the money being once changed from
“ the owner to the highwayman, if but for an instant,
“ it was held, in point of Law, to amount to a Rob-
“ bery; yet perhaps few would have been disposed to
“ bring that point of Law to a Trial in a Case so
“ circumstanced.

“ There is one Case indeed where the force appears
“ so slight, and the threat none, that if no circumstance
“ has been omitted, one might rather be at a loss for
“ the ground of the Judgement: the Case was this:
“ the Prisoner was indicted for assaulting on the high-
“ way, and taking from *Mary Roberts*, against her
“ will, four linen shirts, value about nine shillings.
“ *Mary Roberts* proved, that as she was carrying a
“ basket with linen, a young man came by and
“ snatched the linen off her basket, and ran away
“ with

" with it. And it is said, that on this Evidence the ^{+R. v. Smith al.}
" Prisoner was found guilty of Robbery. † ^{Leveridge.}
^{O. B. 1784.}
^{Add. P. St. 316.}

" With regard to threats, it is not necessary these
" should import Loss of Life or direct corporal In-
" jury from the immediate Act of the threatener:
" it amounts to the Crime of Robbery, if there be
" threats of bringing a person into danger used to
" extort from him his property.

" Thus a threat to accuse a person of a capital
" Felony, and thereby obtaining money from him, is <sup>R. v. Jones, al.
Evans. O. B.
1775. p. 158.</sup>
" an actual Robbery.

" But a Robbery cannot be by Concert and Collu- ^{Foft. 123.}
" sion between the supposed Robber and the party
" from whom the Goods are taken.

" Thus where the Case was, which must be here-
" after noticed for a yet more important reason, that
" Macdaniel, Salmon, and others, procured Peter
" Kelly and John Ellis to commit a robbery on the
" person of the said Salmon, it was resolved, that in
" the Judgement of Law, no Robbery was or could
" be committed on Salmon under such procurement. <sup>R. v. Macda-
niel & al. O. B.
Dec. 1755.
Foft. 121.
to St. Tr. 417.</sup>

" But a man, with a design of apprehending a ^{Foft. 129.}
" Robber, who has infested the Road, may volun-
" tarily expose himself to the hazard of being robbed:
" and his testimony shall be good to convict such
" person assaulting and taking from him his property.

Norden's Case.
Foot. 129.
St. Tr. X.
434—7.
R. v. Belchier.
O. B. June,
1752.

St. Tr. X. 438.

VI. R. v. Tap-
lin.
R. v. Banton.
28 June, 1780.
O. B.

V. etiam ANN.
REG.

I. H. H. P. C.
534, 5.
Aud. P. St. 500.
Comm. IV.
243.

“ Thus one *Norden*, having been informed that one of the early stage coaches had been frequently robbed near the town by a single highwayman, resolved to endeavour to apprehend the robber. For this purpose he put a little Money and a Pistol into his pocket, and attended the coach in a post-chaise, till the highwayman came up to the company, and to him, and presenting a weapon, which was a *tinder-box*, demanded their Money: *Norden* gave him the little Money he had about him; and then jumped out of the chaise with his Pistol in his hand, and, with the assistance of some others, took the highwayman; who was indicted and convicted.

“ In the time of the destructive and ignominious Riots, a man was indicted for going about with a club or bludgeon, and extorting money, under terror of the armed mob, in the name of *Charity to the poor Protestants*. It was left to the Jury, that if they believed he had made use of these circumstances of intimidation to take away the property of another by pretence of charity, it amounted in clear Law to a *Robbery*: and of this he was accordingly convicted.

“ But if words of menaces, or other acts of violence, be not used till after a clandestine taking, this is only *Larceny*: as where *Halfpenny*, going up a bank to open a gap, *Harman* flipt his hand into his pocket and took his purse; and upon *Halfpenny's* seeing it in *Harman's* hand, and demanding it again,

“ *Harman*

" Harman threatened him if he spoke of it ; and went off with the purse : this was ruled only stealth : and he had his Clergy.

" We have seen that of any property which a Man has, either absolute or as bailee, *Larceny*, or *Robbery* consequently, may be committed by taking it from the person who is in possession. And even a Robbery may be committed by taking, with an intent of stealing, Goods from a Robber : and perhaps it might be even laid in the Indictment as for feloniously taking the Goods of the said Robber, for he has property in them against all but the *Owner* or the *Crown* ; though if the true Owner can be known, the right laying of them would be as *his* property ; for it is *not changed* by the Act of Robbery.

" Formerly, under the Statute, it was held necessary that the Robbery be committed *in or near the Highway* ; otherwise it was not ousted of Clergy : and during that Period the River THAMES was construed to be an Highway ; nor perhaps can the legal propriety of the Construction be justly impeached ; but by a subsequent Statute this is rendered immaterial.

23 H. VIII.
C. I.
1 H.H P.C. 96.
IV. Comm. 244.

3 W. & M.
c. 9.

CHAPTER III.

Of BURGLARY.

Comm. IV.
223—8.
3 Inst. 63.

“ The next offence we have to consider is BURGLARY: this is, *breaking into an inhabited Place by Night, with intent to commit a Felony.*

Deut. XXII. 2.

“ This is an aggravation of the breach of social Duty instanced in the preceding Crime: since, together with the personal Attack, it is an invasion of domestic security, and a violation of the hour of rest and peace. The Mosaic Law therefore allowed a *nocturnal House-breaker* to be put to death by the party whom he attacked.

“ And the Abenian Law made a like distinction concerning *nocturnal Thieves* and *Housebreakers*.

V. infra sub
prox. pag.

“ The Law of the Twelve Tables appears to have been to the same effect.

“ Let us now in Order examine the several constituent parts of this offence.

Ed. Ald. 2.
p. 218, 6, et
seq.

Ἐτι μὴ τις μεθ' ἡμέραν ὑπερ πωλήσια δεαχμὰς κλέπτοι ἀπαγαγόντες ταῦς ΕΝΔΕΚΑὶναι. Ἐιδὲ τις ΝΥΚΤΩΡ ὅλην κλέπτοι, τείσοιξεῖναι καὶ ἈΠΟΚΤΕΙΝΑΙ καὶ τεωσαὶ διάκονα, καὶ ἀπαγαγεῖν τοῖς ἴδικα ἐς βελοῦ: ταῦς αἰδόντι ὥντι ΑΠΑΓΩΓΑΙ εἰσιν, οὐκ εἴγυσθας καλατύσασι εἰδίσιν εἴσαι των κλεψυδῶν ἀλλὰ ΘΑΝΑΤΟΝ τὴν ΖΗΜΙΑΝ.

Fifty Drachma's were worth about two Pounds two Shillings of our Money: and a stealing beyond this in the Day-time, or to any amount in the Night, appears to have been a capital Felony by the Laws of Athens. Housebreakers appear to have been considered in the same light of capital offence, as by the Jewish Law.

“ It

“ It must be a breaking so as to enter, or a breaking
“ after the entering. But this breaking and entry is
“ in Law complete, if the party unlock a Door, take
“ the Glass out of a Window, lift the latch of a door,
“ and then set his foot on the threshold; put his arm
“ or an instrument through the opening thus effected
“ in the Window, to draw out Goods, or a Pistol to
“ demand Money.

Comm. IV.
226, 7.
22 A. C. 7.

“ And thus with regard to the breaking and entry,
“ which is in Law *burglarious*: where it appeared that
“ the Prisoner, in the night, cut a hole in the window
“ shutters of the Prosecutor’s shop, which was part of his
“ dwelling-house, and putting his hand through the
“ hole, took out Watches and other things which hung
“ in the shop within his reach: this was holden to be
“ Burglary; and the Prisoner was convicted.

R. v. Gibbons
O. B. June,
1752.
Folt. 107.
1 H. P. C.
551, 555.

1 Hawk. P. C.
103.

“ Where there is no other breaking than of a Chest
“ or Cupboard, great Writers on the Common Law
“ appear not wholly to be agreed. It is shewn by
“ FOSTER in Simpson’s Case, that the Question con-
“ cerning the Chest could not be the Point on which
“ the Evidence of Burglary depended in that Case, as
“ there was a clear unambiguous breaking into the
“ House; and he adds, that the opinion expressed by
“ HALE cannot be Law, if it were meant of a
“ moveable Chest.

R. v. Clement
Simpson.

Kel. 31.

SI NOX FVRTVM FAXIT ET IM ALIS OCCISIT JVRE
CÆSVS ESTO.

ROS. A. R.
588.
O. A. S. 485.

“ He

FIXTURES, whether to be considered Part of the Freehold so as to constitute BURGLARY.

Foss. 209.

Cave v. Cave.
2 Vern. 508.
Tr. 1705.
1 P. W. 94.

" He then subjoins a very valuable observation, " equally resulting from Humanity and exact Discern- " ment, that with regard to *cupboards, presses, lockers,* " and other fixtures of the like kind, a distinction " should be made, in favour of life, between Cases " relative to mere property, and such wherein life is " concerned. That in questions between the Heir or " Devisee and the Executor, those fixtures may with " propriety enough be considered as annexed to and " parts of the freehold. That the Law will presume " it was the intention of the Owner, under whose " bounty the Executor claimeth, that they should be so " considered; to the end that the house might remain " to those who, by the operation of Law, or by his " bequest, should become entitled to it, in the same " plight he put it, or should leave it, *entire and un- defaced*: but that in *capital Cases*, such fixtures " which merely supply the place of *Chests*, and other " ordinary utensils of household, should be considered " in no other light than as mere *moveables*, partaking " of the nature of those utensils, and adapted to the " same use.

L.N.P. 34. 4th
Ed.

" We may add, that even in some Cases of *Prop- perty* (an entire Class may be instanced of very ample " Extent between *Landlord* and *Tenant*) the Doctrine " of *Fixtures* has not been rigorously construed in the " later Decisions. And accordingly the Author of a " Work often cited in this Treatise thus expresses " himself:—That in *Trover* for ten Load of Timber " the

“ the Case was, the Defendant had been Tenant to
“ the Plaintiff, and erected a *Barn* upon the Premises,
“ and put it upon *Blocks* of Timber lying upon the
“ Ground, but *not fixed* in or to the Ground; and
“ upon proof that it was *usual* in that Country to
“ erect Barns so, in order to carry them away at the
“ end of the term, a Verdict was given for the De-
“ fendant. But that although Lord Chief Justice
“ Treby thought proper, in that Case, to take advan-
“ tage of the Custom, yet that it would now, he ap-
“ prehends, be determined in favour of the Tenant
“ without difficulty: for that of late years many
“ things are allowed to be removed by Tenants, which
“ would not have been permitted formerly, as *marble*
“ *Chimney-pieces*, &c. so more strongly in things relating
“ to Trade, as *brewing Vessels*, Coppers, Fire Engines,
“ Cyder Mills, &c. For that, notwithstanding the
“ general Rule of Law is, that whatever is fixed to
“ the Freehold becomes part of it, and cannot be
“ moved, many exceptions have been of late admitted
“ to this general Rule, as between Landlord and Te-
“ nant, or between *Tenant for Life* or *Tail* and the
“ *Reversioner*; though the Rule still holds as between
“ Heir and Executor.

Culling and
Tufnal, per
Treby, Ch. J.
Hereford, 1694.

Ld. Dudley
and Ld. Ward.
Mic. 1751.
in Canc.

“ No Exception can be more agreeable to the Rules
“ and Principles of Law than in favour of Life: and
“ this too seems to be consonant to the Nature of the
“ Crime. The Author of the *Commentaries* is silent
“ upon this Point.

“ Coming

TITLE II.

Constructive breaking.

¹ H. P. C. 102.
³ H. H. P. C.
^{152.}

“Coming down a Chimney has been held Burglary:
“for it is as much closed as is consistent with its use:
“knocking at the door, and *rushing* in with a felonious intent: entering on warrant obtained by false pretences: a servant, or other person lodging in the same house, entering with felonious intent: a servant letting in a robber: nay, it has been even said, entering under pretence of taking lodgings,
“and then *robbing* the owner of the house.

¹ Hawk. P. C.
^{§ 102.}
R. v. Cornwall.
² Str. 881.

TITLE III.

What Place liable to Burglary.

“BURGLARY may be committed by breaking into a CHURCH: it may also be committed by breaking into a walled Town.

Foxt. 38, 9.
R. v. A. Hawkins, O. B.
^{1704.}

“It may be committed by breaking open an House or Building belonging to a Corporation. And thus, the Prisoner being indicted for breaking the mansion-house of *Samuel Story* in the Night-time, it appearing in Evidence that the House belonged to the *African Company*, and that *Story* and several others had apartments there as Officers of the Company, the Judges were of opinion, that the apartment could not be called *Story's* mansion-house, and she was tried upon another Indictment, in which it was laid to be the mansion-house of the Company.

Kel. 27.
Burgess's Ca.
S. P.

¹ H. H. P. C.
^{556.}

“It may be also committed by breaking open a chamber in a College or Inn of Court: or even a “lodging

“lodging in a private House, if the Owner do not Lee and Gansel.
“inhabit it; or if the Owner and Lodger enter by Cowp. 5—7.

“different outward doors: but if the Owner inhabit, Kel. 84.
“and if they enter by the same door, it should be laid 1 H. H. P. C.
“the House of the Owner. qua supra.

“It may be committed by breaking into a barn, 1 H. H. P. C.
“stable, or warehouse, contiguous, or even appurte- 558.
“nant, to a mansion-house: for whatever is within Hawk. P. C.
“the curtilage or homestall is considered as part of the 104.
“House. 1 H. H. P. C.
558, 9.

Par. 2.

*What shall be considered an inhabited House, so as Bur-
glary may be committed therein.*

“It is not necessary that it be actually inhabited at
“the time: what is necessary the subjoined Case will
“explain.

“The Prisoners were indicted for *Burglary* in the R. v. J. and
“dwelling-house of one Mr. Fakney, at Hackney, and M. Nutbrown.
“stealing divers Goods. By the Evidence of Mr. Fost. 76, 7.
“Fakney it appeared, that he held his house for a
“term unexpired, and made use of it as a country-
“house in the summer, his chief residence being in
“London; that about the latter end of the summer,
“he removed with his whole family to his house in
“the city, and brought away a considerable part of
“his goods; that in the November following, his house
“was broke open, and in part rifled; that in conse-
“quence of this he removed the rest of his furniture,
“except a clock, a few old bedsteads, and some lum-
“ber of very little Value, leaving nothing for the
“accommodation of a family: that about midnight,
“on

“ on the first of *January*, the house was broke open :
 “ and it was sufficiently proved to have been done by
 “ the Prisoners. Mr. *Fackney* said, he had not come to any
 “ settled resolution ; but rather inclined totally to quit
 “ the house, and let it for the remainder of the term.

“ The Court was of opinion, that the owner having
 “ left his house without any settled inclination of re-
 “ turning for the season, but rather inclining the con-
 “ trary, and having disfurnished it accordingly, it
 “ could not, under these circumstances, be deemed his
 “ *dwelling-house* at the time the fact was committed ;
 “ and accordingly directed the Jury to acquit the Pri-
 “ soners of the *Burglary* ; but they were found guilty
 “ of the *Larceny*, and ordered for Transportation.

“ The Rule which governed that Case was, that
 “ where the Owner quitteth the house *animo revertendi*,
 “ it may still be considered as his mansion-house,
 “ though no person be left in it : but that, unless
 “ there be an intention of returning, it will not be
 “ *Burglary*.

“ And it hath been held that if a man hire a shop,
 “ parcel of another’s man’s house, and work or trade
 “ in it, but never lie in it, that it is no dwelling-house,
 “ nor can *Burglary* be committed in it ; for that by
 “ the Lease it is *severed* from the rest of the house,
 “ and therefore is not the dwelling-house of him who
 “ holds the other part ; neither can it be said to be the
 “ dwelling-house of the hirer, who never lies in it.

Comm. IV.
225.

“ Neither can *Burglary* be committed in a tent or
 “ booth erected in a market or fair, though the owner

" may happen to lodge there : for so frail and trans-
" fient a place of sojourning is not regarded by Law
" as a *mansion-house*. 1 Hawk. P. C.
104.

TITLE IV.

TIME.

*What shall be accounted Night so as to fall within this
Crime.*

" It is certain that between sun-rise and sun-set
" *Burglary* cannot be committed : the only doubt is
" when *night*, in this sense, shall be said to begin, and
" when to end.

" At *Lancaster Assizes* there was an Indictment for
" *Burglary*, alleging the Fact to be committed in the
" Night, but not expressing about what *hour* it was
" done: Mr. Justice GOULD held the Indictment to
" be insufficient as for a *Burglary*, and directed the
" Prisoner to be found guilty of simple Felony only.
" He said that it is now established that *Burglary* cannot
" be committed during the *crepusculum*; that there-
" fore it is necessary to specify the *hour*, that it may
" appear on the face of the Indictment to have been
" done between the *twilight* of the evening and the
" *twilight* of the morn.

" And the Author of the *Commentaries* says, the
" better opinion seems to be, that if there be *day-light*
" sufficient, begun or left, to discern a man's face
" withal, it is no burglary: but that this will not
" extend to *moon-light*; for then many midnight
" *Burglaries* would go unpunished; and that besides
" the

“ the malignity of the offence does not so properly
 “ arise from its being done in the dark as at the dead
 “ of night, when all the creation, except beasts of
 “ prey, are at rest; when sleep has disarmed the
 “ owner, and rendered his castle defenceless.*

“ This Rule appears at the same time to be most
 “ agreeable to the ancient Authorities.

TITLE V.

Of the INTENT, which shall constitute Burglary:

² Hawk. P. C.
105.

“ A breaking and entering, with an intent to com-
 “ mit a *Trespass*, is not *Burglary*: but with an intent
 “ to commit a *Felony*, whether at Common Law or by
 “ Statute.

* At the time when

— medio volvuntur fidera lapsu.

Apollon. Rhod.

Οὐδὲ Κύνης Ὑλακὴν ἐπὶ αὐτὰ τοῖσιν εἰς δέος ἵστη
 Ἡχίεις. Σιγῆδε μελανθράκης ἔχει δεφτην.

C H A P-

CHAPTER IV.

ARSON, or HOUSE-BURNING.

“ We are now to give attention to the *Evidence* by
“ which that atrocious Crime of *House-burning* may be
“ proved, which is the *malicious setting fire to a House*
“ *of another*.

Comm. IV.
Ch. 16. § 14

“ Barns, stables, and outhouses, come here within
“ the description as *parcel* of the House, as in Bur-
“ glary.

“ If a Man sets fire to his *own* House, and the fire
“ catches any part of the House of his Neighbour,
“ Evidence of this will prove the Indictment.

Comm. 221;

“ The Indictment was for feloniously burning his
“ *own* House, with intent to consume the same and
“ divers *other* Houses contiguous thereto, without
“ naming the owners.

R. v. Holmes.
Mic. 10 Car.
Cro. 376.
S. C. Jones,
351.

“ Holmes was in possession of the said House under
“ a Lease from the *Haberdaubers' Company, London.* It
“ does not appear any House but his own was reached
“ by the Fire: but *Croke* thought the setting fire to a
“ Man's *own* House in a City or Town was a felonious
“ House-burning, on account of the imminent and
“ manifest danger to others: the other Judges, how-
“ ever, thought this Case did not amount to Felony.
“ Later Decisions have settled the Law upon the sub-
“ ject differently from both points of this Case: the
“ House would now be considered as the House of the
“ *Landlord*: and the burning of a Man's *own* House,

Fo. 116.

A a a “ had

" had Holmes's fully answered that description, would
" not with Croke have been considered a Felony, from
" the probability of its burning those contiguous,
" without the event taking place in some degree."

Foſt. 113...6.
R. v. Eliz.
Harris.
Ayleſb. Lent
Aſt. 1753.

" On an Indictment against *Elizabeth Harris* for
" maliciously setting fire to and burning a dwelling-house
" in the possession of *Edward Stokes*, for which Crime
" *Anne*, the Wife of *William Course*, was also indicted
" as an Accessary before the Fact,—On the Evidence
" it appeared that the Prisoner *Elizabeth* was the daughter
" of the Prisoner *Anne*, by a former husband,
" *John Harris*; and that *John Harris* died feſied of
" the equity of redemption of this house and another
" adjoining to it, ſubject to a mortgage term for 20*l.*
" and that the equity descended to his eldest ſon, a
" child, left, with other children, under the care of
" their mother the Prisoner, *Anne*, who was entitled
" to Dower out of these houses, but which Dower
" had never been assigned: that *Anne*, having the care
" of her ſon and his estate, let these houses to *Edward*
" *Stokes*, at the rent of 5*l.* per Annum; but having a
" large family, ſhe was obliged to ask relief of the
" parish: on being denied ſuch relief, unless the parish
" officers were let into Receipt of the Rents, ſhe fre-
" quently threatened to set the houses on fire: and at
" length the Prisoner *Elizabeth*, by the direction of
" *Anne*, ſet the house on fire charged in the Indictment.
" The mischief did not spread farther.

" Both were convicted: but Judgement was re-
" ſpited for the opinion of the Judges: on delibera-
" tion,

“tion, the Judges were unanimously of opinion, that
“Edward Stokes being in possession as Lessee, the burn-
“ing of the House of Edward Stokes was duly proved ;
“it being his, to inhabit, during the Term, under a
“demise from Anne in behalf of her son : and it was
“said, and not denied by any, that if Anne had
“been seised of the freehold and inheritance, it would
“have been alike Felony in Anne to have burnt the
“house : and accordingly Anne was executed, but
“Elizabeth recommended to pardon, on condition of
“Transportation.

“Evidence of any part of the House being burnt is ^{1 Hawk. P.C.}
“proof of this Crime. ^{106,}

TITLE II.

Malicious firing, &c. of SHIPS.

“The malicious sinking, firing, or otherwise en-
“deavouring to destroy Ships is a Crime analogous to
“that mentioned in the last Chapter.

“Nothing occurs particular with regard to the Evi-
“dence in proof of it, farther than may be collected
“by inspection of the Statutes for the prevention of
“this enormous offence.

IV. Comm.
245.
1 A. st. 2. c. 9.
4 G. I. c. 12.
12 A. st. 2.
c. 18.

C H A P T E R V.

Of MAIHEM.

" This Crime is classed next to that of *Murder*,
 " being such an Act of Violence and Outrage against
 " the person of another, as both in the disposition of
 " the offender and the tendency of the attempt nearly
 " approaches to it.

Braft. fo. 144.
 22 & 23 Car. II.
 c. 1.
 Burnet I.
 269—70.

" This at Common Law was a *Misdemeanour*, except
 " in one extreme Case, where it anciently at least was a
 " Felony: but now by a Statute, made originally on
 " occasion of an insult to a Gentleman then in Par-
 " liament, Sir John Coventry, the effect of a very
 " unkingly Revenge for a reflection on the Amours of
 " Charles, if any Person shall, of malice, and by
 " lying in wait, cut out or disable the tongue, put out
 " an eye, slit the nose, cut off a nose or lip, or cut off
 " or disable any limb or member, with intent to maim
 " or disfigure,—such person (with the Accessories before
 " the Fact) shall be guilty of *Felony without Benefit of*
 " *Clergy*.

" On this Statute a most extraordinary Case came
 " to be argued.

VI. St. Tr.
 212---27.
 R. v. Wood-
 burne and
 Coke.

" Arundel Coke, Esq. who had married the sister of
 " Mr. Crispe, and expected, as appeared, an Estate
 " on his Decease, employed the other Prisoner, a la-
 " bourer, to *murder Crispe*: and it was in Evidence
 " that Coke stood by Woodburne, while Woodburne struck
 " Mr. Crispe with an hedge-bill. The Criminals
 " failed

“ failed of perpetrating the intended *Murder*, but the
“ Nose of Mr. *Crispe* was slit by a transverse Wound,
“ which cut into the Nostril.

“ At the Trial the *lying-in-wait* and the *maiming*
“ were fully proved against the Prisoners: but *Coke*
“ offered, as a Ground for taking the Case out of the
“ Statute, that he had no intent to disfigure, but only
“ to *murder*: and he would have had this argued by
“ Counsel as a point of Law in his favour. The
“ Court informed him, that it was a point of *Evi-*
“ *dence* on the Facts before the Jury; upon which the
“ Jury was intitled to judge of the intent. They
“ were both found *guilty*: and after the Verdict *Coke*
“ renewed his objection; and on this it was argued
“ by *Coke* himself and by the Counsel in behalf of the
“ Crown.

“ The *Lord Chief Justice** said the Jury had the full
“ Evidence before them on which to determine, whe-
“ ther by the preparation before the Fact, the manner
“ of the Fact, the Nature of the Instrument, and of
“ the Wound, a lying in wait with intent to maim,
“ and an actual maiming was proved: that they had
“ found their Verdict accordingly on the Evidence left
“ to them, upon all the circumstances required by the
“ Statute. That therefore it could be of no avail to
“ the Prisoner to make it appear that by maiming he
“ intended to commit Murder.

* *Vid. IV.
Comm. 207.*

“ It was agreed that a maiming in fighting a *Duel*
“ would not be within the Statute: as being without
“ the requisite of *lying in wait*.

CHAPTER VI.

Of other HEINOUS INJURIES.

“ There might now follow the *Evidence* in proof of a certain Class of Crimes, which arise from the Abuse of Inclinations implanted in us for the happiness of individuals and the preservation of society. But as little aid could be derived towards illustrating the Nature of Evidence by a detail of the legal requisites to the proof of the Crimes, and as the subject is sufficiently understood whenever there is a necessity of its being legally discussed, it is needless, if not improper, to add more than merely references to the Authorities which may be seen in the Margin.

Comm. IV.
c. 15.
Pr. P. L. 259--
69.

C H A P-

C H A P T E R VII.

Of HOMICIDE.

" The Evidence here requires great firmness of Judgment and accuracy of discrimination. It shall be endeavoured to give the governing Principles by which the several degrees of *Homicide* are ascertained.

" *HOMICIDE* is the killing of an human being born into the World; either accidentally, justifiably, excusably, or feloniously.

" According to these several Qualifications of the Fact, it will become either,

1. *Homicide by Misadventure*;
2. *Homicide*, founded,
 1. On public Justice,
 2. On personal just Necessity;
3. *Homicide by Chancemedley*,
 1. Voluntary striking, but by Passion;
 2. Involuntary, but not without Blame in Act or Neglect;
4. *Homicide criminal*,
 1. Manslaughter,
 2. MURDER, of Malice forethought.

T I T L E II.

Of *Homicide by Misadventure*.

" This is when one, doing a lawful Act, without intention of bodily harm to any person, and using proper caution to prevent damage, happens unfortunately to kill.

Fest. Dist. II.
ch. 1. p. 258.

" An instance of this, which exactly coincides with,
" and clearly illustrates, all the points of the Definition,
" is given in the Mosaic Law.

Deut. xix. 5.

" When a man goeth into a wood with his neighbour to
" bew wood, and his bond fetcheth a stroke with the axe
" to cut down the tree, and the head slippeth from the
" helve, and lighteth upon his neighbour that he die. *

" Death happening in the exercise of an innocent
" and allowable recreation, without neglect of usual
" and reasonable precautions, falls within the description of Homicide by Misadventure.

Disc. II. p. 260.

" But the learned Author of the Discourses on the Crown Law subjoins, that he would not be understood to speak here of Prize-fighting and public BOXING MATCHES, or any other exertions of courage, strength, and activity, of the like kind, which are exhibited for lucre, and can serve no valuable purpose; but, on the contrary, encourage a spirit of idleness and debauchery: these he conceives to fall under a quite different consideration: we may now add, that they have already, since their reintroduction, been the cause of much and various mischief. When speaking of them as misdemeanors, there was occasion to advert to the probability of

VI. Sharp on Cr. Law, 31, n.

Bibl. Hebr.
Lips. 1740.
Plantini 1572.
Bomburgi 1526.

* Or, as it might perhaps rather be rendered, and the iron glanceth from the tree, and findeth, or lighteth upon, his neighbour. It seems somewhat doubtful whether the Septuagint did not so understand it: for they have rendered the passage thus: Καὶ δὲ οἱ ἵστηθεν μέλα τὰ ἀλασία ἵε τὸ δέρμα συναγαγεῖν ξύλα καὶ εκρυθῆ ἐχόει ἀνά την αἴρην ποτίσσει το ξύλον καὶ εκποστὸν το σύδρων απὸ το ξύλου το χρη το ἀλασίαν.

The original words in that part of the Text, of which the rendering appears doubtful, are, וְנַשְׁלַח תְּמִימָה. Possibly נַשְׁלַח might be the original reading: but the Plantin Edition has also נַשְׁלַח, and so has the Venetian: the substantial sense agrees either way: only נַשְׁלַח seems generally to have an active sense. Kennicott furnishes no various reading to support the Conjecture.

" their

“ their rising to Felony; *Manslaughter*, if not *Murder*. ||

“ Playing at *Foils*, if Death happen by an Accident, which due Attention to the rules of this exercise could not be expected to prevent, appears to be one of the instances of *accidental Homicide*.

“ If a Man, without request of the Rider, whip ^{Fest. quasupradic.} the Horse of another Man, whereby he rides over a Child and kills it, this is *accidental Homicide* in the Rider.

“ If a Parent, in correcting his child, a master his servant under age, an officer a criminal, give an unhappy stroke, which causes death, no malice appearing from the instrument, the manner, or the motive of the correction, this too is Homicide accidental by *Misadventure*: but the circumstances thus exculpating the party must all clearly appear in Evidence; otherwise it will be *Manslaughter*, if not Murder. The general Application and Purport of this Rule will hereafter be seen more fully.

Fest. 2554

“ Where Workmen throw stones, rubbish, or other things from an house in the ordinary course of their business, giving notice, if it be in a place or at a time that crowds are not likely to be passing by, it will be *Homicide by Misadventure*: the circumstances which will render it otherwise are to be noticed in the latter part of this Chapter.

|| Since the writing of this, instant DEATH has been the consequence to one of the Combatants in a Boxing Match at BRIGHTHELMSTONE, the 6th of August, 1788, in a Conflict between one Tyne and Earl, in which Earl was struck to the Ground, and died immediately. The Article whence this is extracted, says, that

his Royal Highness the Prince of WALES declared he would have some settlement made on the nearest relation of the deceased; but that, on account of the dreadful example he had then witnessed, he would never more see or patronize another stage-fight. We may add, ôùi ùù, àùù' ôùù; wùù.

Gentleman's
Mag. August,
1788, p. 745.

Of

TITLE III.

Of HOMICIDE founded on JUSTICE.

" " Homicide, in the former instance, was considered
 " " as not culpable, because owing to such Accidents as
 " " human foresight is not presumed adequate to prevent:
 " " we are now to instance a species of *Homicide* in obedi-
 " " ence to the severe Necessity of PUBLIC JUSTICE.
 " " This is *justifiable* when in strict pursuance of legal
 " " Authority. This divides itself into several branches:
 " " 1. In civil Cases where resistance is made,
 " " 2. In Cases of Felony, where resistance is made,
 " " 3. In Cases of Felony, where the Felon fleeth, and
 " " cannot be apprehended.

Par. 2.

1. Of Resistance in civil Cases.

" In civil Cases the rule appears to have its necessary
 " limitations: for, as it has been before remarked,
 " that not every Assault will justify every Battery, so,
 " notwithstanding the Officers of Justice are in the
 " necessary discharge of their duty protected, not
 " every flight resistance would justify killing a party
 " who should oppose the execution of civil Process.
 " This will be farther illustrated in treating,

Par. 3.

2. Of Resistance in criminal Cases.

" Resistance in criminal Cases, especially of *Felony*,
 " exempts the person whose duty it is to apprehend,
 " from any degree of legal imputation, if he kill
 " instantly him who resists.

Par. 4.

3. Of Flight in Case of Felony.

" Presumptively, he confesses the Crime who flies from
 " the legal investigation of a charge against him.* But
 " if

* *Fatetur facinus qui Iudicium Force, is not of the first order. The fugit. This Presumption, in real admirable TUSCAN CODE (admirable*

" if a person fleeth in a case of misdemeanor, this will
" not justify the taking of his life to prevent an escape:
" for neither does the safety of others require it; nei-
" ther is it consistent with any idea of Justice, that he
" should forfeit his life by flight who could not have
" forfeited it on Conviction.

" The Application of this Rule most usually hap-
" pens in Case of a Burglary or Highway Robbery,
" or Murder: and in these instances it is obviously the
" duty of every man to endeavour to prevent an
" escape: the Officer, on Warrant describing the per-
" son, and any *private* individual, on view of the of-
" fence at the instant of its being committed: and if
" the fugitive *cannot be overtaken*, the killing of him
" will be justifiable Homicide.

Fest. 271, 2.

Par. 5.

" The Case of a dangerous Wound given, the As-
" saffin endeavouring to escape, and a bye-stander
" killing him, appears to be a Case of some difficulty.
" This was precisely the Case of *Wilcox*, as appears by
" the Recital in the Act of Parliament. *Guiscard*, a
" French Papist, being brought before the Privy Coun-
" cil, on a Warrant from the Secretary of State, to be
" examined on a charge of traitorous Correspondence
" with *France*, stabbed with a pen-knife the Right
" Honourable *Robert Harley*, Chancellor of the Ex-

9 A. c. 16.

rable in many of its provisions,
and excellent in the intention of
all) renders flight a mere indica-
tion of Guilt.

Art. XXXVII. Reproviamo
il sistema della passata Legisla-
zione per cui la contumacia del
Reo e la di lui latitazione ou af-
sentazione dallo stato, si confide-

rava come una *Confessione*: mentre
reconoschiano quanto sia ingi-
usto e fallace, e quanto facili-
mente il timore di un Processo e
della Carcere possa indurre alla
contumacia, ed alla fuga, anco
gli Innocenti. *But of this farther
in its more immediate Place.*

" chequer,

" chequer, then sitting as one of the Privy Council, " and endeavoured to wound others of the Council : " in preventing farther mischief, and in apprehending " Guiscard, the Constable, *Nathan Wilcox*, to whom " the Warrant for apprehending and bringing him " before the Council had been directed, and in whose " Custody of consequence he then was, gave unavoid- " ably several Wounds and Bruises to the said *Guiscard*, " and upon the Inquest taken on View of the Body, it " was found that *Guiscard* died of the Bruises so given " to him by *Wilcox*.

" The Act provides an Indemnity to *Wilcox* and " every other person (generally, for no other is named) " who were assisting in the defence of the said *Robert* " *Harley*, and in apprehending and securing the said " *Guiscard*, and in so doing did assault, bruise, and " wound the said *Guiscard*,

" Had the Act stopped with a mere *Indemnity*, it " would have appeared, under all the circumstances, " extraordinary. But it concludes by *declaring*, that " the said A&ts and Doings were (as they undoubtedly " were) necessary and lawful.

" But here (even waiving any Notice of the Justifi- " cation which arises from the Necessity of immediate " Defence against an Assassin, the person who mor- " tally wounded *Guiscard* appears to have been a Peace

Howel's Hist. of England.
Vol. IV. p. 510.

" It appears that Mr. St. John (the then Secretary of State) on the Attack on Mr. Harley made and repeated by the Assassin, drew his sword, as did the rest, and gave *Guiscard* several Wounds : but Mr. Harley (who had fallen) recovering himself, the Lord Paulet desired them not to kill *Guiscard*, and the Messengers

and Door-keepers coming in, they secured the Assassin, who, while they were binding him, addressed himself to the Duke of Ormond, Mi Lor Duc d'Ormond, pour quoi ne me depechez vous ? But the Duke answered, Ce n'est pas l'Affaire des honnêtes Gens ; c'est l'Affaire d'un autre.

" Of-

" Officer answerable for the Custody of him under
" the Warrant, and, except by force, the Escape of the
" Criminal must be taken to have been impossible to be
" prevented: this therefore leaves the Question unan-
" swered, whether when Murder is attempted, and a
" Wound given, a *By-stander* may kill the *Assassin* in
" his flight, if he cannot otherwise be secured. The
" Statute of *Henry the Eighth* (to be mentioned pre-
" sently for another reason) does not seem to reach
" this Case: which, for obvious reasons, is not pro-
" bable to fall under judicial investigation; and there-
" fore there is the less cause to wonder if no direct pre-
" cedent should be founded on it: but on principles of
" social duty and safety to the Community, the killing
" of such offender in his flight, if he cannot be taken,
" seems justifiable. And it should seem that even in a
" sudden affray, if a person, interposing to part the com-
" batants, giving notice of his friendly intentions, should
" be assaulted by either, and in the struggle should kill,
" this is justifiable Homicide; for it is in performance
" of an Act which is the duty of every man.

Foxt. 272.
Kcl. 66.

Par. 6.
EXECUTION.

There is another great head of *justifiable Homicide* founded on public Justice: which is, where one killeth another as *Executioner* pursuant to the Sentence of a Court having competent Jurisdiction; but then it must be *pursuant*: for a change of the *Mode of putting to Death* will change the Quality of the Act, and is even said to be *Murder*: which, however, must be understood with Limitations.

TITLE IV.

Of HOMICIDE se defendendo, justifiable.

" A Woman, to defend herself from Violation, may ^{115.}
" justifiably kill the Assailant. ^{Foxt. 274.}

" If

" If a Man attempt to break into the House of another by Night, with intent to rob or murder him, or if he stop another on the Highway, and endeavour to rob him, the party attacked, or any other seeing the Attack made, may justifiably kill the Felon.

24 H. VIII.
" 5.

" This was true at Common Law: and the Statute but ascertains that Truth: reciting, that whereas it had been in question and ambiguity, if any evil-disposed person should attempt Murder, Burglary, or Robbery, and should happen to be slain by him or them whom the said persons should attempt to rob or murder, or by any person or persons being in their dwelling-house, which the same evil-doers should attempt *burglariously* to break by Night, whether any *forfeiture* should be incurred by killing of such person, that, for the Declaration of such Ambiguity and Doubt, no *forfeiture* shall be incurred for the Death of such evil-disposed person in such manner slain: which, but for the commendable timidity of those who pass upon Life, little needed a written Law: for the Principle which it asserts is, in the Words of the *Roman Orator*, a Law not written, but native; not derived from instruction, tradition, or records, but caught, imbibed, and retained, from the impulse of Nature on our hearts: that if our Life fall into any unforeseen snare; if it be surprised by the sword either of robbers or of enemies, force, to what extreme soever it extend against the Assailant, is justified by the Necessity of Self-preservation.*

MILONTANA.

* *Est enim hoc, Judices, non imbuti sumus; ut si vita nostra in scripta sed nata lex; quam non aliquas infidias, si in vim, si in didicimus, accepimus, legitimus, sed verum ex Naturâ ipsa arripuimus, non docti sed facti, non instituti sed*

" On

R. v. Cooper.
Cro. Car. 544.
P. 14 Car.

"On an Indictment for murdering *W. L.* in Southwark, with a spit, the Evidence was, that the Defendant being a Prisoner in the King's Bench, and lying in the house of one *Anne Carricke*, who kept a Tavern in the Rules, the said *W. L.* at one o'clock in the night, assaulted the said house, and offered to break open the door, and brake a staple thereof, and swore he would enter the house and slit the nose of the said *Anne Carricke*, because she was a bawd, and kept a bawdy-house: and the said *Cooper* dissuading him from those courses, and reprehending him, he swore that if he could enter, he would cut the said *Cooper's* throat: and he brake a Window in the lower room of the house, and thrust his rapier in at the Window against the said *Cooper*, who, in defence of the house and himself, thrust the said *W. L.* into the eye; of which stroke he died. The Question was, whether this were within the Statute? And the Opinion of the Court was, that if it were true he brake the house with an intent to commit Burglary, or to kill any therein, and a party within the house (although he be not the Master but a Lodger or Sojourner) kill him who made the assault and intended mischief to any in it, that it is not Felony, but excusable by the said Statute, which was made in affirmation of the Common Law.

24 H. VIII.
* Semaine's
Cafe.
5 Co. 91. b.

Of

TITLE V.

Of HOMICIDE se defendendo, *excusable*.

" This is to be understood in the Case where the
 " Killing is eventually become necessary for *Self defence*, but the *cause* which rendered that Defence
 " necessary is *not altogether without blame* on the part
 " of the Killer.

Fest. Disse. II.
Ch. III. § 2.

" Such is the Case of Self-defence upon Chance-
 " medley (possibly, *cbaud melle*) when in a sudden af-
 " fray one killeth another.

" This bordereth very nearly upon *Manslaughter*:
 " and to place it on the foot of mere excusable Self-
 " defence it ought to appear in *Evidence* that the
 " party killing *retreated* as far as he could with safety,
 " and then, urged by instant necessity, killed the other
 " for the preservation of his own Life.

¹ M. H. P. C.
479.

Stans. 15.

" As where *A.* being assaulted by *B.* returneth the
 " blow and a *Fight ensuetb*, *A.* before a mortal wound
 " given declineth the conflict and retreateth as far as
 " he can with safety, and then, in his own defence,
 " killeth *B.* this, saith *Stamford* is excusable Self-
 " defence, though *A.* had given several blows, not
 " mortal, before his retreat.

Fest. 277.

" And *Foster* holdeth that the first Assault will make
 " no difference if either party quitteth the combat and
 " retreateth before a mortal wound given: and retreateth

“ with a sincere intent to avoid mischief, not insidiously and for malicious advantage.

“ And there must appear a real Necessity.

“ Therefore in a Case where a man was indicted
“ for the murder of his brother, the Facts in Evi-
“ dence were, that the Prisoner that night came home
“ drunk; his Father ordered him to go to bed, which
“ he refused, whereupon a scuffle happened between
“ the father and son: the deceased, who was then in
“ bed, hearing the disturbance, got up and fell upon
“ the prisoner; threw him down, and beat him upon
“ the ground, and there kept him down so that he
“ could not escape or avoid the blows: but it did not
“ appear the deceased had any intention against his
“ brother’s Life, but only to chastise him for his misbe-
“ haviour and insolence towards his father: and while
“ they were thus struggling together the prisoner gave
“ the deceased a wound with a pen-knife; of which
“ wound he died.

Regina v. Nailor.
O. B. 1704.
Foft. 277.

“ The Judges, Holt, Tracey, and Bury doubted
“ whether this were *Manslaughter* or *se defendendo*; and
“ a special Verdict was found stating the Facts.

“ On a conference after Michaelmas Term it was
“ unanimously holden by all the Judges of England
“ that this was *Manslaughter*; for that there did not
“ appear to be any inevitable *Necessity* so as to excuse
“ the killing in this manner.

TITLE VI.

Of MANSLAUGHTER.

See. 290.

" From such Facts attending the Death of another
 " as are either inevitable, or strictly authorized, or the
 " consequence of excusable infirmity on the part of the
 " Killer, we now come to *Evidence* of such killing as
 " the Law deemeth criminal, though not without such
 " indulgence to human frailty as exempts from the
 " necessity of capital Punishment.

" Words of Reproach, or provoking Actions or
 " Gestures, expressive of Contempt or Reproach, with-
 " out an Assault upon the person, will not so far excuse
 " the use of a deadly weapon as to render the fatal
 " consequences *Manslaughter* and not *Murder*: but a
 " stroke with the unarmed hand or with a stick not
 " likely to kill would be a *Manslaughter* in such Case.

" Evidence of an intent to kill, or to do some great
 " bodily harm, the probable consequences of which
 " might be death, place Homicide under the denomi-
 " nation of *Murder*; from whatever circumstances
 " such malignity of intention is made apparent.

" A man finds a *Trespasser* in his ground: in the first
 " transport of passion he beateth him (which it was
 " not lawful for him to do on the mere *Trespass*) and
 " unhappily kills him, this is *Manslaughter*.

" But then the beating must be so circumstanced as
 " not to carry with it an intent of killing, but merely to

“ chastise him for the *Trespass*, and to deter him from
“ repeating it. Therefore in such a Case, if he draw
“ an hedge-stake, or beat out the man’s brains with a
“ bill, or even with an ordinary cudgel outrageously
“ and persistingly beat the Trespasser beyond the
“ bounds of ordinary excusable resentment, whereby
“ he dieth; this *Evidence* of Malice tending to the
“ death of another, and thus terminating, carries the
“ crime beyond the Limits of *Manslaughter*.

“ There being an affray in the street, one *Stedman*,
“ a foot soldier, ran hastily towards the combatants.
“ A Woman, seeing him run in that manner, cried
“ out, Yoo will not murder the Man, will you?
“ *Stedman* replied, What is that to you, you b——?
“ The Woman thereupon gave him a box on the ear,
“ and *Stedman* struck her on the breast with the pomel
“ of his sword; the Woman then fled, and *Stedman*
“ pursuing her, stabbed her in the back. *HOLT* was
“ at first of opinion that this was *MURDER*, *a single*
“ *box on the ear from a Woman* not being a sufficient pro-
“ vocation to kill in this manner, after he had given her
“ a blow in return for the box on the ear; and it
“ was proposed to have the matter found specially.
“ But it afterwards appearing, in the progress of the
“ Trial, that the Woman struck the soldier in the face
“ with an iron patten, and drew a great deal of blood,
“ it was holden clearly to be no more than *Man-*
“ *Slaughter*.

O.B. Apr. 1704.
R. v. Stedman.
MSS. Tracy
and Denton.

“ The learned Judge, in observing upon this Case,
“ says, the smart of the man’s wound and the effusion

" of blood might possibly keep his indignation boiling
" to the moment of the fact.

" Upon this Case, it may be farther remarked, that
" Sir Michael Foster seems with reason to be far from
" clearly satisfied with the ultimate Decision of its not
" amounting to *Murder*.

" But one of the strongest Cases is that of Mr.
" Lutterel.

*Rex v. Reason
and Tranter.*
1 Str. 499---
502.
VI. St. Tr. 195
---211. S. C.
Fost. Difc. II.
Ch. V. 292---4.

" Captain Lutterel, on the 17th of October, 1720,
" about the hour of ten in the forenoon, in going from
" his Lodgings in *Surrey Street* to the Water-side, was
" arrested by the Defendants, who informed him of
" the Cause of the Arrest, that it was at the suit of a
" Mr. Rous for 10*l.* He submitted to the Arrest, and
" desired them to return to his Lodgings, for that he
" would there pay the Money. They complied, and
" returned to the door with him: but Reason was the
" only person that then went up; Tranter saying that
" he would go and fetch the Attorney's or Solicitor's
" Bill. The deceased went up one pair of stairs:
" Reason went with him: they went into the Dining-
" room. Captain Lutterel went to Mrs. Lutterel, who
" was in her Bed-room on the same floor, and said,
" My Dear, don't be frightened; here are some Rascals
" who have abused me in the street. Mrs. Lutterel sent
" the Servant (who was with his Master when arrested)
" to her Nephew. When the Servant returned, he
" found Mr. Lutterel and Reason in the Dining-room.
" Mr. Lutterel, as appears by the Evidence of the
" Maid Servant, had been up the next flight of stairs,

" and had brought a brace of *Pistols* down with him,
" and put them on each side of his Coat: the Maid
" had asked him what he meant to do with them, and
" had reminded him they would frighten her Mistress,
" who was with child. Mr. *Lutterel* said, he did not
" design any hurt, but seems to have intimated that he
" would not be insulted. (To explain this it is ma-
" terial that the Servant, present when the Arrest was
" made, spoke to abusive language against his Master
" before they went with him from the Street to his
" Lodgings, as of calling him *Minter*, with allusion
" to his supposed secreting himself in places of pri-
" vilege, to avoid payment of his debts.) The Maid
" Servant persuaded him to lay them on a Table at the
" lower end of the room, opposite to the Chimney:
" he had then only his Cane in his hand: thus the
" other servant found him on his return from his Mis-
" tress's Nephew's. He proved his Master desired,
" after this, to see their Warrant, which he then, on
" being shewn it, threw down with an expression of
" contempt. Mr. *Lutterel* said to his Lady, *Fetch the*
" *Money, and I will pay these Rascals.* She went out
" accordingly, and was in her Closet taking out some
" Money; *Reason* said, he must have *Civility Money*.
" To this demand of *Extortion* Mr. *Lutterel* replied,
" *That he would give such Rascals no Civility Money, for*
" *they bad shewn him no Civility.* *Tranter* came; the
" Boy went down and opened the Door for him; *Tran-*
" *ter* ran up: the Boy staid to shut the Door: but
" hearing immediately a rustling or noise, ran up after
" him, saw *Tranter* close with his Master, and throw
" him against the Closet Door; and that *Reason* ran

“ him through with a sword : that he took *Reason* by
 “ the sword-arm, who said, *Damn me, if you don’t go*
 “ *out of the Room, you shall die before your Master.*
 “ The Boy then went out and alarmed the Neigh-
 “ bours.

“ The Maid Servant swore, that, being alarmed with
 “ the Noise encreasing in the room, she slept softly
 “ through the Passage, threw open the Dining-room
 “ Door, and saw her Master lying on his back upon
 “ the floor, *Reason* stabbing him while holding up
 “ both his hands as if asking for Mercy ; that the
 “ other Bailiff was standing by her Master ; that she
 “ ran to the Door and cried *Murder* ; then a Pistol
 “ went off ; and about two Minutes after, another.

“ An opposite Neighbour declared upon her oath,
 “ that, after hearing one Pistol go off, she saw a fat man
 “ go to the window, take another, and let it off to-
 “ wards the Fire-side. Mr. *Lutterel* and *Tranter* were
 “ both little men.

“ The Waterman, that had been waiting for Mr.
 “ *Lutterel*, and came in upon the Alarm given by the
 “ Boy, saw one Pistol lying upon the Table, met *Rea-*
 “ *son* with his sword drawn, who was putting it
 “ into the scabbard, and saw the sword of the deceased
 “ lying upon the Floor broken : *Tranter* was standing
 “ by the Table : the last Pistol went off as the water-
 “ man came up.

“ Mr. *Lutterel* was found lying before the Fire-place.
 “ He had received ten considerable wounds ; two at
 “ least

" least of them, mortal; one a *Gun-shot* wound about
" an Inch below the right breast, and one with a sword
" in the *Thorax*, which had wounded the Diaphragm.

" *Tranter* was wounded in his right-hand, and had a
" rasure on his Wrist, and he had also a slight wound
" on his head. *Reason* had a little Wound in one of
" his Fingers. Two Pieces of Ball were extracted
" from *Tranter's* hand. Captain *Luttrell* survived these
" Wounds about twelves Hours, and conversed in a
" recollecting manner: he declared to the Clergyman and
" Surgeon who attended him, that he never drew his
" sword or fired a Pistol; that he was barbarously
" murdered; that they both ran him through; that
" *Reason* drew his (Mr. *Luttrell's*) sword, after stabbing
" him; and that he broke it in *Reason's* hand. It ap-
" peared in Evidence that Mr. *Lutterel's* Finger and
" Thumb were cut: and the hurt of *Reason's* Finger
" seems to have happened in the same struggle for the
" sword.

" All these points of *Evidence* appear to bear one
" way and mutually to confirm each other: for with
" regard to the Witness on the opposite side of the street
" mentioning (as she did) the Pistol to have been taken
" off from the Window, the room by other circum-
" stances appears to have been a small one; the distance
" of the Table from the Window could not therefore
" be great; and to a spectator across the street, if any
" one took the Pistol from the Table, it may naturally
" be supposed, the appearance would be as if he had
" taken it from the Window.

" But there was one material difficulty in the account given by the deceased. He said, according to the Evidence of one of the Surgeons, that the little man held the first pistol to his breast, and shot him in the body; and that then the fat man held the other pistol to his head, and shot it off. Now it is difficult to conceive how in doing this he should be able to avoid wounding his companion; yet it does appear by the Surgeon's Testimony, that there were powder-marks on Mr. Lutterel's Face, and that consequently since the Gun-shot Wound was below the right breast, neither of the Pistols could be fired by him against any other person.

" On the other hand, for the Defendants, it appeared, that the deceased, who had disclaimed having given any Provocation, on being desired to recollect himself, said, that they gave him abusive language, which had induced him to strike one of them: this appears to have been the cause of the slight wound *Tranter* had received on the head with a cane or stick: and the Witness for the Prisoners, on whose testimony alone this rests as to the circumstance of original provocation on the part of the deceased, farther says, that he acknowledged he several times threatened him: the probability of this is to be estimated by the situation of the pistols and all the other circumstances taken together.

" It is to be observed, that, according to the Boy's Evidence, no deliberate intention, secretly reserved in his mind, of getting to his lodgings in order to avail himself of the pistols, seems imputable to the deceased: for it was in Evidence, that he offered

" to

"to go to *Westminster*, and they refusing this, at last
"consented to go to his Lodgings.

"With respect to his pretending to go up stairs for
"the Money, neither does that appear, but the con-
"trary: for he had desired Mrs. *Lutterel* to fetch the
"Money. No stress can be placed on the supposed
"lenity and gentleness of the Officers: which seems
"merely to have consisted in an improper indulgence
"accompanied with most offensive behaviour towards
"the unhappy Gentleman, and assumed as a pretence
"for extortion. On being refused their Civility Money,
"it is probable Mr. *Lutterel* might see sufficient in
"their behaviour to believe, that paying what he was
"legally liable to pay would not prevent his being
"forced from his lodgings: with this apprehension, as
"it should seem, he brings down the Pistol; and if
"Credit is to be given to concurrent uncontradicted
"Testimony and corroborative circumstances, he was
"readily induced to lay them out of his own power,
"when reminded of the situation of his Lady, and the
"Alarm that might take place. That the wounded
"and disarmed victim was not proved to have begged
"verbally for mercy, but was seen with his hands
"raised and extended,—his silence and situation plead-
"ing for him,—can hardly be thought a difference fa-
"vourable to the Prisoners. No Language could speak
"so much.

"Imperfect Reports are indeed very justly censured
"as the bane of all science that dependeth on the pre-
"cedents and examples of former times: especially
"in a Case like this, where every circumstance weigheth

"some-

" something in the scale of Justice. And in illustrating
 " by Cases the important Theory of Evidence on the
 " most awful subject to which it can be applied,
 " nothing clear, satisfactory, or certain, could be de-
 " rived to the Student from an incomplete repre-
 " sentation. The Case, however, in all its circumstances,
 " so far as they seemed either way capable of affecting
 " the Decision, it is hoped, is here fully set before
 " the Reader, whose Judgement on it is to be deter-
 " mined by general Principles.*

R. v. Rowley.
 22 Rep. 87.
 Cro. Ja. 296.
 1 H. H. P. C.
 453.
 Ed. Raym. 1498.
 Post. 294, 5.

" Rowley's Son fights with another Boy, and is
 " beaten : he runs home all bloody to his Father, who
 " takes a small cudgel, and as it seems (after running
 " three quarters of a mile to overtake the boy by
 " whom his son had been beaten) gives a single stroke
 " with this stick, of which the boy afterwards dies.

" This was ruled *Manslaughter* : because of the
 " sudden heat and passion : and because, as it seems, the
 " instrument was not likely to kill, nor were the
 " blows, with vindictive cruelty, repeated.

" After reciprocal Words of Provocation, if an
 " immediate combat ensue, and one kill the other, our
 " Writers in general on the Crown Law agree this is
 " but *Manslaughter*, if no unfair advantage be taken :
 " and that in such conflicts it mattereth not whether the
 " person killed or his antagonist gave the first blow.

* The Historian of the Roman Empire almost directly charges as *Murder* in Belisarius an *Act* for which that General bad a much better Defence than these Bailiffs could prove, and as strong a one at least as they, on any supposition compatible with full proof, could possibly have.

" A bene-

“ A benevolent and learned Author has controverted
 “ this opinion : and contends that killing with any
 “ weapon, which from its Nature is presumed to be
 “ deadly (otherwise than in the execution of Justice,
 “ or just and necessary Self-defence) is Murther : and
 “ that Passion excuseth not where the Instrument em-
 “ ployed demonstrates an *intention* of killing, or of
 “ doing some great bodily harm likely so to terminate :
 “ for that *voluntary killing without necessity* is the very
 “ Definition of *Murther*.

Sharp on Cr.
 L. 14---20.
 23---30. 32---
 36. 38---42---
 44.

“ Thus much is certain, that any degree of preme-
 “ ditation, any interval in which the Gust of Passion
 “ subsides, will take away, in such Case, the excuse
 “ allowed to human infirmity, and the killing will then
 “ be *Murther* : for which reason in Manslaughter there
 “ can be no Accessories before the fact ; because, if
 “ not unpremeditated, it is not *Manslaughter*, but
 “ *Murther*.

3 Inst. 55.
 Post. Disc. V.
 § 4.

1 Hawk. 76.

“ It is manifest that this consideration affects the
 “ Case of *duelling* : and that the very sending a *Chal-*
 “ *lenge*, or retaining *seconds*, is decisive Evidence of
 “ that deliberate purpose which constitutes *Homicide*
 “ *prepense*.

“ A killing consequent on a Trespass will be *Man-* For. 253---62.
 “ *slaughter*, when it would be otherwise *Homicide* by
 “ *Misadventure*.

TITLE VII.

Of HOMICIDE on Malice prepense, or MURTHER.

“ The Idea of this Crime may be formed by negative Induction from the preceding particulars: for if it be neither *Homicide* founded on public Justice, nor in necessary or excusable Self-defence, nor in Passion, nor in Accident, it remains that it is MURTHER.

“ However, it is proper to shew by Cases Evidence of Facts characterizing this offence.

“ We have seen that *moderate Correction* is excused under the head of *Misadventure*: but *Correction* unrelentingly continued, though the strength manifestly is sinking under it; *Correction* with Instruments not adapted to just and reasonable Chastisement, but likely to produce *Death*, will be MURTHER.

R. v. Grey.
Kcl. 64.

“ Thus where it was found upon a *special Verdict*, that the Prisoner was a *Blacksmith*, and that *William Golding*, the deceased, was his servant, and that *Grey* gave him an order relative to the business of his Trade, which *Golding* neglected to perform: That *Grey* coming in, asked him, why he had not done it, and told the deceased, that if he would not serve him, he should serve in *Bridewell*; *Golding* replying, that he had as good serve in *Bridewell* as serve *Grey*, he immediately, without other provocation, struck *Golding* with a Bar of Iron, with which they were working together at the Anvil, and by the said Blow brake his skull, of which he died. The Judges

" Judges of the King's Bench, and Bridgeman, Chief Justice of the Common Pleas; agreed this was *Murder*: but the man being of good character prior to this offence, it was certified to the King, that, although in strictness of Law he had been guilty clearly of *Murder*, yet it was attended with such circumstances as might render him an object of his Majesty's Grace and Pardon, he having a very good Report among all his Company of the Trade and of all his Neighbours. And he was pardoned accordingly.

" In this Case one of the Judges* cited a Case at • *Morton.*
" the Oxford Assizes before the then Judge of *Affize*, † + *Jones.*
" where a smith being chiding with his servant, he
" having a piece of hot iron in his hand, ran it into
" his servant's belly, and it was judged *Murther*, and
" the party executed. And *Bridgeman*, Chief Justice
" of the Common Pleas, said, that in his Circuit there
" was a Woman indicted for murdering her Child;
" and it appeared in *Evidence*, that she kicked her,
" and stamped upon her *Belly*, and he judged it *Murther*:
" And *Twisden* said, he ruled such a Case formerly on
" Gloucester Circuit: for a piece of iron or a sword, or
" a great cudgel, with which a man probably may be
" slain, are not Instruments of Correction: and therefore
" where a Master strikes his Servant willingly with
" such things as those are, if Death ensue, the Law
" shall judge it of *malice prepense*: as in the Statute,
" enacting, that if one do cut out the Tongue, or put
" out the eyes of any of the King's subjects, of Malice

" pre-

R. v. Ld. Mor.
2y. 28 Apr.
1666.
28 Car. II.
Kcl. 55.

" prepense, it shall be *Felony*; if a Man cutteth out
" the Tongue of another voluntarily, the Law judgeth
" it of *Malice prepense*: and so where one Man killeth
" another without Provocation, the Law judgeth it
" *Malice prepense*: and in the Lord *Morley's Case* it
" was resolved by all the Judges, that Words are no
" Provocation to lessen the offence from being *Mur-
" tber*, if one Man kill another upon ill Words given
" to him.

Original Assault on a Person who hath not then drawn.

Post. 295.;
Kcl. 61. S. P.
130.
V. infra.

Ld. Raym. 148,
9.

" If *B.* draweth his sword, and maketh a pass at *A.*
" whose sword is at that time *undrawn*, and then *A.*
" draw and a Combat ensue, and *A.* be slain, this is
" *Murther* in *B.* for *B.* by making his pass, his adver-
" sary's sword undrawn, shewed that he sought his
" blood; and *A.*'s defending himself, which be bad a
" *Rights to do*, will not excuse *B.*

*Par. 2.**Assault sought as a Colour for Homicide.*

" Much more where a Provocation is *sought* with
" an intent to kill, under colour of self-defence or of
" sudden resentment, such killing is *Murther*; for the
" pretence is the strongest Proof of the deliberate
" Malignity of the Purpose. Thus upon an Indict-
" ment of *Murther*, the Case was:

R. v. R. Mason.
Post. 132—5.
Winch. Summ.
Aff. 1756.

" The Prisoner, *Richard Mason*, was with the de-
" ceased, *William Mason*, another Brother, and some
" neighbours, drinking at a public house; till, grow-
" ing warm in liquor, but not intoxicated, the Prisoner
" and the deceased began, idly and in sport, to pull
" and push each other about the room. They then
" wrestled one fall, and soon after played at Cudgels
" by Agreement.

" All

" All this time no tokens of Anger appeared on either side : till the Prisoner in the Cudgel-Play gave the deceased a smart blow on the temples. The deceased thereupon grew angry, and, throwing away his cudgel, closed with the Prisoner, and they fought seriously a short space ; but the company interposing, they were soon parted.

" The Prisoner then quitted the room in anger : and when he got into the street, was heard to say, " with an execration, that he would fetch something and stick him : and on being reproved, repeated, " with yet more bitter execration, that he would fetch " something and run him through the body.

" The deceased and the rest of the company continued in the room where the Affray happened : and in about half an hour the Prisoner returned, having put off a slight thin coat, which he wore when quitting the room, and put on one of a coarse thick cloth. The door of the room being open into the street, the Prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right ; looking at the company, but silent.

" The deceased invited him in : the Prisoner answered, that he would not come in. *Why will you not ?* said the deceased : *Perhaps you will fall on me and beat me,* replied the Prisoner. The deceased assured him he would not : and added, *Besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me :* the Prisoner answered,

"swered, I am not afraid to do so, if you will keep off
"your fists.

"Upon these words the deceased got up, and went
"towards the Prisoner, who dropped the cudgel as the
"deceased was coming up to him. The deceased
"took up the cudgel, and with it gave the Prisoner
"two blows on the shoulder. (These seem to have
"been slight blows in the nature of a Challenge to
"renew the contest with cudgels). The Prisoner
"immediately put his right hand into his bosom, and
"drew out the blade of a *tuck sword*, crying, *Damn*
you, stand off, or I will stab you, and instantly, with-
"out giving the deceased time to step back, made a
"pas at him, but missed him: the deceased there-
"upon gave back a little; the Prisoner, shortening
"the sword in his hand, leaped forward towards the
"deceased, and stabbed him to the heart.

"The Judges, having had copies of the Case left
"at their Chambers, met in *Michaelmas Vacation* at
"the Chambers of Lord MANSFIELD: and unani-
"mously agreed, that there are in this case so many
"circumstances of deliberate Malice and deep Re-
"venge on the part of the Defendant, that his offence
"cannot be less than wilful *Murder*. And that nei-
"ther the circumstance of the blows before the sword
"produced, nor the precedent quarrel, alter the
"Case: because he appeareth to have returned with a
"deliberate resolution to take a deadly revenge for
"what had passed: and the blows were, on his part,
"plainly

" plainly a provocation *sought*, that he might execute
" the wicked purpose of his heart.

" He was soon after executed.

" In HALE's *Summary* there is a Case of killing Summ. 43.
" with much less Malignity in Evidence, on Provoca-
" tion sought, held to be *Murder*.

" It is this: *A.* and *B.* fall out; *A.* says he will Laurence's
Cafe.
" not strike, but will give *B.* a Pot of Ale to touch 38 Eliz.
" him; *B.* strikes; *A.* kills him:—*Murder*.

" *A.* and *B.* are at some difference. *A.* bids *B.* take H. H. P. C.
457.
" a pin out of the sleeve of *A.* intending thereby to
" take an occasion to strike or wound *B.* which *B.*
" doth accordingly, and then *A.* strikes *B.* whereof
" he dieth: this was ruled *Murder*: because it was
" no provocation when he did it by the consent of *A.*
" but it appeared to be a malicious and deliberate
" Artifice thereby to take occasion to kill *B.*

Par. 2.

*Death of one Person occasioned by Mischief intended against
another.*

" There is a species of Homicide, which in a vague
" sense may be said to be misadventure, but which in
" criminal Jurispudence is referred to a very different
" Denomination: when, for instance, a man, meaning
" to kill *A.* in attempting to execute that *murderous* in-
" tent, misses *A.* and kills *B.* who is standing near *A.*
" This on the clearest Principles is evidently *Murther*:
" for the Malice hath only glanced beside the person who
" was its object; but a mischief of the same kind; and
" equal in degree, hath been actually produced.* And
" wherever the death of the party intended to be
" slain would have been *Murther*, it will amount to the

Post. 261.

* *Delictum egreditur personam.*

Foſt. 261, 2. “ ſame offence, if the ſtroke or poison take place
“ againſt another.

TITLE VIII.

Of the killing of OFFICERS in the Execution of their Office.

^{2 H. H. P. C.} “ The killing of Officers employed as Ministers of
457. “ public Justice, or of private persons exerting them-
“ ſelves for the reſtitution of order and ſecurity, is
“ *Murther.*

Foſt. 3rd, 9. “ And the Officer is understood to be under this
“ protection of the Law, not only while in the actual
“ execution of his office, but in thoſe circumstances
“ which neceſſarily precede or are ſubsequent, as in
“ *going or returning*: for every privilege of perſonal
“ indemnity which belongs to a *Witness* belongs to one
“ who contributes his afſtance to the execution of
“ the Laws. Therefore an opposition with intent to
“ hinder his doing of his duty, while on his way for
“ that purpose, or a pursuit of him on his return, if
“ in either Case he be slain, will be Murther: for the
“ Power of the Laws muſt neceſſarily be ſuperior to
“ that of any individual. *

^{1 H. H. P. C.} “ And the protection extendeth to every man, whe-
463. “ ther required or not, aiding the officer in the diſ-
“ charge of his duty.

Foſt. 5th. “ In the Case of a *fresh pursuit*, and yet more of an
“ *bue and cry*, all who join in aid of the pursuers are
“ under this legal Protection.

* *Neminem oportet effe Legibus potentiorum.*

“ The Ministers of Justice in civil suits are in the
“ same manner protected within the extent of their
“ Authority.”

Ibid.

Par. 2.

*Warrant protects the Officer, if good in Form, and issuing
from a competent Jurisdiction.*

“ By the legal Process under which an officer acting
“ may not lawfully be resisted, and if slain in oppo-
“ sition to such Authority, the Killer incurs the guilt
“ of Murther, is meant *Process not defective in form,*
“ *and issuing from a competent Jurisdiction.*

*Fest. qua supra.
Disc II.
Ch. VIII. § 8.*

“ *R. Curtis* was indicted, at the *Summer Assizes* for
“ the Town and County of *Newcastle upon Tyne* for
“ the *Murder of William Atkinson.* *

*R. v. Curtis.
Anno 1756.
Fest. 135.*

“ Upon the Trial it appeared, that a Process, in
“ the Nature of a *Capias ad satisfaciendum*, issued
“ against one *Charles Cowling* out of the Town Court,
“ directed to *Joseph Dixon*, a serjeant at mace belong-
“ ing to the Court, who prevailed on *John Suretees*,
“ another serjeant at mace, to go and execute it for
“ him: *Suretees* was resisted by *Cowling*, with the
“ assistance of the Prisoner.

“ On this, *Suretees*, by collusion between himself
“ and *Dixon*, procured his name to be inserted by the
“ Mayor’s Officer in the Process, and then went
“ before a Justice, and made oath, that he did, by
“ virtue of the Process to him and the said *Joseph*
“ *Dixon* directed, apprehend the said *Cowling*, who by
“ wrestling and strokes got out of his hands and
“ escaped.

“ Thereupon the Justice granted a Warrant, di-
“ rected to all Serjeants at Mace, Constables, and

CURTIS'S Case.—On the Resistance to an Officer acting under Warrant.

“ other Officers within the said Town and County,
 “ reciting the Process, the Arrest, the Resistance, and
 “ Escape, as stated in the complaint, and command-
 “ ing all Officers, &c. to apprehend the said Cow-
 “ ling, and bring him before the Justice who granted
 “ the Warrant, or any other Justice of the Town and
 “ County, to be dealt with in the premises as the
 “ Law directeth.

“ On receipt of this Warrant, Dixon and Suretees,
 “ who were both serjeants at mace, as has been
 “ stated, went back to Cowling's Workshop, taking
 “ with them the deceased and one Coulson, as their
 “ assistants. They found the shop-doors shut, and
 “ calling to Cowling, who was there with the Prisoner,
 “ informed him they had an escape warrant against
 “ him, and required him to surrender: otherwise they
 “ said they would break open the door.

“ Cowling refused to surrender; and the prisoner
 “ looking out at a Window with an axe in his hand,
 “ swore, that the first man that entered should be a
 “ dead man. Dixon, however, with Coulson and the
 “ deceased, broke open the shop door, and the de-
 “ ceased being foremost, the Prisoner, with one blow
 “ of the Axe on the left side of the head, killed
 “ him.

Foft. 136,

“ On this Evidence the Prisoner was found guilty
 “ of wilful Murder: but doubts having been ex-
 “ pressed by some gentlemen of the profession, he
 “ was respite till the opinion of the Judges could be
 “ taken.

“ On

" On a conference, nine of the Judges present
" (with whom *Wilmot*, Justice, who was absent, con-
" curred) held it to be *Murther*: but two thought it
" was only *Manslaughter*. All agreed it was a legal
" Warrant, though obtained by unwarrantable pre-
" tences and perjury: for that where the Justice hath
" Jurisdiction, the Validity of the Warrant never will
" depend on the Truth of the Information.

" They likewise agreed, that Peace Officers, having
" a legal Warrant to arrest, for a *Breach of the Peace*,
" may break open doors; giving due notice of their
" Warrant, and having demanded admittance.

" The point here in question was, *Whether due*
" *Notice had been given?* And if not, *What would*
" *be the effect of its omission under all the circumstances*
" *of this Case?*

" On the first of these Questions the actual deter-
" mination of the Case turned: and the nine Judges
" were of opinion, that no precise form of Words
" being required in a Case of this Nature, it was suf-
" ficient if the party had notice that the Officer came
" not as a mere Trespasser: and that if, after this
" Notice, he resist, and the Officer, or any of his
" assistants, be killed in consequence of such resistance,
" it will be *Murther*; provided that it appear in Evi-
" dence the Officer had a legal *Warrant*: for that the
" person, after such notice, making resistance, doth
" it at his peril. He acteth avowedly and deliberately
" in defiance of the ordinary course of Justice.

" The Judges on the other side went upon the
 " ground that an escape did not *ex vi termini*, or in
 " notion of Law, imply a *breach of the peace*; and
 " consequently that there was not due notice of their
 " coming with an authority grounded on such breach;
 " and that therefore the Officers were mere Trespassers,
 " and the killing of them not *Murther*.

" But some of the Judges were of opinion, which
 " seems indeed to be well warranted, and apparently to
 " have the concurrence of Sir Michael Foster, that it
 " would have been *Murther*, even admitting the Of-
 " ficers could not justify breaking open the Door.
 " They had made no Arrest: and if merely *Tres-
 " passers*, they were not so against the Prisoner, nor
 " was any injury done to his person or property. And
 " that such a *Trespass* against another was not sufficient
 " provocation for killing a man in such a manner, and
 " that too in performance of a preconceived intention.

Foot. 311, 2.

" From this Principle, that the legality of the
 " Warrant, in point of Form and Competency of
 " Jurisdiction, is sufficient to intitle the Officer to
 " protection, and to render absolutely unlawful re-
 " sistance against it, results the consequence, that the
 " *Writ* and *Warrant* is sufficient to be produced in
 " Evidence where a person is killed in executing Pro-
 " cess from a Sheriff, and the killer is indicted for
 " Murther; and that it is not necessary to produce the
 " Judgement or Decree. And accordingly it was
 " ruled by Lord HARDWICKE.

R. v. Rogers.
 S. A. Cornw.
 1735.

" But

" But the Question has been variously discussed.—
" If an Officer act without Authority, and Resistance
" be made by persons not conscious of the defect in
" his Authority, nor directly interested in the seizure
" thus made, whether this defect shall avail such
" persons so as to discharge them from the Crime of
" *Murder* ?

TITLE IX.

Of Resistance to a defective Authority not known to be
such.

" We will first observe on a Case where the Defect
" was previously known: which is here stated as the
" Facts are said by the Reporter to have stood on the
" special Verdict.

Kel. 59.
25 Apr. 1666.
18 Car. II.
1 H. H. P. C.
465.
S. C. cit. Kel.
137.

" JOHN BERRY and two others, *without Warrant*,
" impressed a Man to serve in the King's service against
" the Dutch, who thereupon went with the said John
" Berry quietly into Cloth Fair, and Hopkin Hugget,
" with three others, walking together in the Rounds
" in Smithfield, and seeing the said Berry, with the two
" others, and the Man impressed, go into Cloth Fair,
" instantly pursued, and overtaking them, demanded
" to see their Warrant, but were shewn a Paper, which
" they said (and as it appears truly) was not a War-
" rant: and immediately they drew their swords to
" rescue the said man *imprest*, and did thrust at the
" said John Berry (not having, at that time, so far as
" appears, a sword drawn) whereupon the other party
" drew also, and they fought together; and Hugget
" gave Berry the Wound in the Indictment charged,
" whereof he instantly died.

" All the Judges of England being assembled,
" eight, of whom were the Chief Justice Bridgeman, and
" Hales, Chief Baron, were of opinion this was *Man-*

"*Slaughter* only, as then advised, though they did
"not absolutely bind themselves to the then declara-
"tion of their sentiments.

"They said, if a man be unduly arrested, or re-
"strained of his Liberty, by three men, although he
"be quiet, and do not endeavour any rescue, this is a
"Provocation to all other Men of *England* for com-
"mon Humanity's sake to endeavour his rescue.

"On the other side, *Kelynge*, *Twisden*, and two other
"of the Judges, thought that this was *Murder*: there
"being, in their opinion, no provocation at all: for
"that insulting Words to the party, how offensive
"soever, were held to be no provocation so as to
"reduce a killing occasioned by them to less than
"*Murder*: and that the seeing of a man unduly im-
"pressed, who went quietly, could be less so to per-
"sons who were no Friends or Acquaintance, but
"merely strangers, and who, *without desiring* those who
"had him in custody to let him go, *drew*, and ran
"at them.

"Perhaps this last circumstance may be justly
"thought to argue such a wantonness of attack as
"comes within the limits of *Murder*: but had there
"been a demand and refusal, then, under the circum-
"stances of this Case, there seems no reason for en-
"tertaining an Idea that it could be more than *Man-*
"*slaughter*. Perhaps on that supposition it would have
"been more properly *justifiable Homicide*: for, instead
"of an *excusable* killing on personal Provocation, it
"would then have been the result of a necessary inter-

" position in behalf of a man injuriously deprived of
 " his Freedom: a Duty incumbent on them as Men
 " and Citizens. Had *Hugget*, or any of his party,
 " even without such demand, knocked down *Berry*
 " with his Fist, by which he had died, (after being
 " convinced there was no Warrant) this too, it should
 " seem, clearly could have been only *Manslaughter*: ^{2d Raym.}
 " but the drawing and making a push against persons
 " not then on their defence is undoubtedly a material
 " consideration.

" In the preceding instance the want of a *legal*
 " Warrant was previously discovered by the *Rescuers*:
 " in the Case now to be considered it was otherwise.

" On an Indictment against the Defendants for the
 " *Murther* of one *Dent*, the Jury found a *special Ver-*
 " *dict*: stating an Act made in the Reign of Queen
 " *Elizabeth*, for the Government of *Westminster*, ap-
 " pointing a Court within that City to punish *inconti-*
 " *nence*, according to the *Custom of London*. They
 " further found, that by the *Custom of London*, any
 " Constable may execute his office through the *whole*
 " *City*: and that the like hath been used in the *City*
 " of *Westminster*.

² Raym. 3296.
 Reg. v. Tooley
 & al.
 Mic. 8 Anne.

" And that on the 8th of *March*, 8 *Anne*, three
 " *Commissioners*, by virtue of the Act for recruiting
 " the Army, made their Warrant, directed to the Con-
 " *stables* of the *Parish* of *St. Margaret, Westminster*,
 " within the *City* of *Westminster*, to make search
 " within the said *City* and *Liberty* for persons within
 " the description of that Act: which Warrant, after,

" on

" on that day, was delivered to the Constables of St. Mar.
 " garet's to be executed. And farther, that after, on that
 " day, Samuel Bray came into the Parish of St. Paul,
 " Covent Garden, to execute the said Warrant: and
 " after, on the same day, between eight and nine at
 " night, found one Anne Dekins in the street, between
 " the Play-house and the Rose Tavern, whom he sus-
 " pected to be a disorderly person; and then and
 " there, as a disorderly person, took into his custody,
 " to carry her to prison for her safe custody. That
 " the same Woman had been before taken up by the
 " said Constable as a disorderly person: that, on
 " being taken up the said 8th of March, she had not
 " misbehaved herself: that Bray had no Warrant to
 " take or to detain her: and lastly, that after the
 " taking of the said Anne Dekins, the Prisoners (Bray
 " then having her in custody) in another place, called
 " Covent Garden, did meet, drew their swords, and
 " assaulted Bray, to rescue her from his custody: that
 " he shewed his Constable staff, and declared he was
 " about the Queen's business, and intended no harm
 " to the Prisoners: whereupon they put up their
 " swords, and Bray carried the Woman to the Round-
 " house: that the Prisoners, a little after, the said Anne
 " Dekins being in the said Prison in Covent Garden,
 " drew again, and assaulted the said Bray on account
 " of the imprisonment of the said Anne Dekins, and
 " to get her discharged: that Bray called persons to
 " his assistance to keep her in custody, and to defend
 " himself from the violence of the Prisoners: that
 " Dent came to his Assistance, and before any stroke,

" one

"one of the Prisoners gave Dent the mortal Wound
"in the Indictment mentioned, of which he died:
"and that the two others were aiding and assisting.

"The Judges were divided: Holt, Chief Justice,
"Powel, Powys, and Gould, Justices of the King's
"Bench, Barons Price, Bury, and Lovel, that it was
"Manslaughter; but Trevor, Chief Justice of the
"Common Pleas, Blencow, Tracy, and Dormer, Jus-
"tices of the Common Pleas, and Ward, Lord Chief
"Baron, that it was Murder.

"The last day of the Term, Holt, in the King's
"Bench, delivered the opinion of all the Judges. He
"said, those Judges who thought it Manslaughter
"founded their opinions upon the following reasons:

"That it was a sudden Action, without any pre-
"cedent malice, or design of doing hurt, apparent,
"but only to prevent the imprisonment of the Woman,
"and to rescue her who was unlawfully deprived of
"her liberty. That the power of the Constable was
"not enlarged by the Statute of Elizabeth: that if it
"were, he was not acting under that Statute, but
"under Commissioners appointed for a different pur-
"pose; nor legally as Constable, had it been within
"his district, for some precedent ground of suspicion
"should have appeared; and that therefore the Pri-
"soners in this Case had sufficient provocation; for if
"one person be imprisoned unjustly, it is a sufficient
"provocation to all persons, not merely out of com-
"passion, but because the Liberty of the Subject is
"invaded

“ invaded by the very means provided for its defence,
“ which is a provocation to all the subjects of *England*.

“ Of the five Judges who thought it was *Muriber*,
“ four concurred in opinion that *Bray* had no Autho-
“ rity; but of those four held, at the same time,
“ that she, being a stranger to the Prisoners, it was no
“ provocation to them.

“ In Answer to the Objection, that the Prisoners
“ were ignorant of the Defect of *Bray's* Authority in
“ this Case, and therefore could not avail themselves
“ of an extenuation resulting from this defect, *HOLT*,
“ Chief Justice, answered, it was like the Case of
“ *Sir Harry Ferrers*, who was arrested by a Warrant,
“ naming him *Knight*, when he was *Baronet*, and his
“ servant killed the bailiff, which was adjudged only
“ *Manslaughter*, because he was arrested by an ill
“ *Warrant*. And he put the Case, if a Man, having
“ a Judgement against him, goes abroad, and upon
“ his return is informed that there are *Bailiffs* in his
“ house: he goes in and kills a Man under this sup-
“ position; but it proves they are thieves who are
“ come to rob him: in this Case he is not liable on
“ an Indictment of *Murther*; he has ignorantly done
“ an Act to which the Law annexes no criminality;
“ and the *Ignorance of Fact* may excuse, but shall
“ never condemn a person.*

“ To the reasoning on that side which held the kill-
“ ing of *Dent* (the person whom *Bray* had called to
“ his assistance) only *Manslaughter*, these considerations
“ have been opposed.

* *Ignorantia Facti excusat; Ignorantia Juris non excusat.* 1 Rep.
177.

Ignorantia Facti in reatu solvendo, non in comprehendo, valet.

“ That

" That the Case of *Hugget* does not seem to warrant this Decision, because there was a quarrel and affray, and swords drawn on both sides: (but for this View of *Hugget's* Case there appears hardly a sufficient Authority: *Kelynge's* Report, who had such means and obligation to be exactly informed, not corresponding with these circumstances) that, with respect to the Case of the servant of Sir *Henry Ferrers*, that was a quarrel after Sir *Henry* had submitted to the Arrest, and was put into a place of security.

Fob. 313, 4.

" The Reporter from whom we must derive our immediate light on this subject, thus states the Case:

" That the Indictment was against Sir *Henry Ferrers*, Knight, who pleaded the Misnomer, and on a second Indictment, the general Issue, and was tried at the Bar: and upon Evidence it appeared that he was arrested for Debt, and that *Nightingale*, his servant, in seeking to rescue him, as was pretended, killed the said *Stone*. But because the Warrant to arrest him was by the Name of *Henry Ferrers*, Knight, and he never was a *Knight*, it was agreed by all the Court, that it was a variance in an essential part of the Name, and they had no Authority by that Warrant to arrest Sir *Henry Ferrers*, Baronet; so it is an ill Warrant; and the killing of an officer in executing that Warrant cannot be Murther, because no good Warrant. But upon the Evidence it appeared clearly, that Sir *Henry Ferrers*, upon the Arrest, obeyed, and was sent into an House, before the

R. v. Sir H.
Ferrers.
Cro. Car. 373, 2.
Tr. 10 Car.

" fighting

" fighting betwixt the Officer and his servant, where
 " fore he was found not guilty of the *Murder* and
 " *Manslaughter*.

" Nothing is here stated of a quarrel; and if the
 " Defence had been tenable on the ordinary proof of
 " *chance-medley*, it seems very improbable that an en-
 " deavour to rescue would have been set up, or, as
 " Croke says, pretended, under circumstances such as
 " those of the Case.

" Sir Harry Ferrers's Case appears then, in reality,
 " to have turned, so far as the servant was concerned,
 " upon the formal *Invalidity* of the *Warrant*.

Foxt. 315, 6.

" That in *Tooley's Case* (a Distinction, of which
 " neither the existence nor the importance can well be
 " controverted) the persons (soldiers) who drew on
 " *Bray*, unarmed against such weapons, put up their
 " swords, appeared to be pacified, and cool reflection
 " seemed in some measure to have taken place. At
 " the second Meeting the deceased received his death's
 " wound; before a blow was given, or, for aught ap-
 " peared, offered, on the part of him, or any of his
 " party: and this rather upon resentment, and a
 " principle of *revenge* for what had before passed,
 " than upon any hope or endeavour to assist the Wo-
 " man, she having been secured in the Round-house
 " before the second encounter, and before the de-
 " ceased appeareth to have taken any part in the
 affair.

" That,

" That with respect to *provocation*, the illegality of " the imprisonment, a fact of which they were ignorant, " could not be esteemed to have been any; or had it " been a provocation, it would not have been such an " one as to excuse *voluntary homicide*.

" Thus much, it should seem, may, and ought to " be admitted: nor is it on the ground of *Provocation* " that such Act should be excused.

" But if a Person see one Man in actual Custody of " another, and endeavour to rescue him, and resist- " ance being made, he kill the Officer of Justice, or an " assistant to such Officer, if a legal Warrant existed, " his Ignorance of this Fact will not excuse him: if " the Officer were without Warrant, under which he " might legally detain the party, the resistance to his " rescue was unjustified, the Officer being in effect " as none for this purpose; and whether the person " rescuing suspected or believed him to have legal " Authority, does not seem to vary the legal conse- " quences flowing from the Fact once ascertained: if " he believed him to have none, still if he had, it " was at the utmost Peril of the person thus inter- " posing; if he believed him to have Authority, yet " if he was in fact holding another in restraint ille- " legally, the misapprehension, which could not have " excused the party killing, had he rashly taken on " him the Risque of resisting a real Authority, shall " not, on the supposition of its being defective, de- " stroy him, if he has, in fact, resisted a void Au- " thority, though on the supposition of its being real.

TITLE X.

. Of IMPLIED MALICE.

" The Malice implied by Law is a felonious intent:
" not a design merely conceived from hatred towards
" a particular person.

" Thus where one goes forth with an avowed intention of killing the first man he meets, and meeting one whom before he had never seen, kills him,
" there is no need of proof of particular Malice.

3 H. H. P.C.
445, 6.
2 H. P. C. 80.
Fob. 256, 7.
3 H. H. P. C.
455.

" So where one gives *Poison* knowingly to another,
" the *poisoning* itself implies that *deliberation* which
" includes *Malice*.

R. v. Brom-
wich.
B. 18 Car. II.
B.R.
3 Lev. 280.

" Or where one kills another, though in mutual
" Combat, in pursuance of a *deliberate* intent to kill.

" And of this *deliberation* it has been held to be
" sufficient *proof*, where on a Quarrel, the one said to
" the other, If we fight at this time, I shall have the
" disadvantage from my high-heeled shoes; and pre-
" sently after they went out and fought.

Crompt. Just.
23.
Kel. 56.

Reg. v. Maw-
bridge.
Hil. 1 A.
Kel. 219.

" And on the same Principle appointing the place
" has been held *proof* of that *malice* which in Law
" implies a murtherous intent.

" And on a special Verdict, on the Indictment for
" the killing of Mr. *Cope*, these Facts being found,
" that the Prisoner and the deceased being in the
" Guard-room of the Tower, of which the deceased
" was the *Lieutenant*, the Prisoner reflected on a
" Woman then in company, of acquaintance with
" Mr. *Cope*; and that the Prisoner using many af-
" fronting Words, and threatening her, Mr. *Cope*
" desired him to desist, saying, that he must protect
" the Woman; on which the Prisoner desisted; but
" demanded

" demanded satisfaction of Mr. *Cope*, who told him
 " that it was not a convenient place; but that at an-
 " other time and place he would be ready; and in the
 " mean time desired him to be civil, or to leave the
 " company: that the Prisoner rose, and was going
 " out of the Room, and in going snatched up a
 " Glass Bottle full of Wine, and violently threw it at
 " Mr. *Cope*, and thereupon struck him on the head,
 " and immediately drew his sword: that Mr. *Cope*,
 " rising from his chair, took another Bottle, and
 " threw at the Prisoner, which hit him, and broke his
 " head; but that Mr. *Cope* had no sword drawn; and
 " that between the Prisoner's drawing his sword, and the
 " thrust made at Mr. *Cope* therewith, by which he
 " received the mortal Wound in his left breast, there
 " was no intermission.

" It was argued before all the *Judges*: who, except
 " *Trevor*, Chief Justice of the *Common Pleas*, were all
 " of opinion that the Prisoner was guilty of *Mur-
 " tber*.

" And if one hath a reasonable Cause to go to an-
 " other's House, to expostulate concerning a disap-
 " pointment, yet not such Cause as would prevent his
 " Entry against the Will of the Owner from being a
 " a Trespass, and the Owner resist his Entry; where-
 " upon the party disappointed by the Owner draweth
 " his sword and killeth the Owner, it seemeth to be the
 " better opinion that this is *Murtber*.

" And where the killing has been in consequence of
 " insulting gestures, this implies *Malice*: for the Law
 " regards not such looks and behaviour as a provo-
 " cation."

*Clemen v. Sir
 C. Blunt on
 Appeal of Mur-
 " tber.*

*2 R. Rep. 460.
 Kel. 1345.*

*Watts v. Brains
 on Appeal.
 Cro. Eliz. 778.
 Mic. 42 & 3
 Eliz.*

D d d

" When

III. Inst. 52.

“ When a Gaoler kills a Prisoner by *Dureffe*, the Law implies *Malice* from the manner of the Death.

R. v. Bam-
bridge.
Guildh. on
Appeal of
Murther.
Jan. 26, 1729.
IX. St. Tr. 182.

VI. 2 E. III.
18 b.
Folt. 322.
2 Str. 856, 884.

“ On the Indictment against the *Warden* of the *Fleet*, the Chief Justice stated the Law, that if “ *Castell* was removed without his consent to a place “ where a man lay sick with the *Small Pox*, notwithstanding his expostulation to the Warden, representing that he had never had it; that his *dying* afterwards of that distemper, caught in the place to which he was so removed, would be imputable as *Murther* to the Warden: but that without the concurrence of these circumstances, it would not be *Murther*.

“ So causing the Death of another by withholding the nourishment necessary to support Life, is *Murther*; and of Murther thus perpetrated against their Child, a Man and his Wife were convicted before Mr. Justice *Ashurst* at the *Bury Assizes*.

IV. Comm. 197.
1 H. H. P. C.
431.

“ So wilfully turning loose a wild Beast out of wantonness amongst a Crowd is *Murther*, if one be killed; because of the apparent probability that such consequences would happen: and a Man in doing an unlawful Act is presumed to intend its natural consequences.

Hale, 431.
LX. XI. 29.

“ And the Law seemeth to be the same, if, after notice of mischief done, the Owner of a *Bull* or other mischievous Animal suffer it to go loose.

Crompt. 24.
H.H.P.C. 431.

“ Laying an *infant* in an orchard, covered with leaves, where a kite came and struck it, this exposure was held Murther.

“ If

Killing of an Officer known to be such; or Person interfering to keep the peace, and manifesting such his intent.

771

“ If an Officer of Justice, having a Warrant from a
“ competent Jurisdiction not defective in Form, be
“ resisted and slain, or any other person be slain who
“ cometh to his Aid, this is *Murber*, as we have
“ seen already: for the Law inferreth Malice from
“ the voluntary resistance to its known Authority.

“ But it is necessary there should be Notice, either ^{Fol. 310, 311;}
“ express or implied: of such Officer *witbin his di-*
“ *briet*, it hath been deemed that the Law presumeth
“ Notice: and such are therefore called *known* and
“ *sworn Bailiffs** or Constables.

“ And in the day, within the District, the *Staff*, ^{Kel. 115, 6.}
“ or in the Night commanding Peace in the King’s
“ Name, or otherwise expressing his Authority and
“ intent, will be sufficient: for, though the staff will
“ not make a Constable, yet within his jurisdiction it
“ is a competent intimation of his legal interference.
“ And after such Notice, it will be *Murber* to kill
“ any Person interfering to prevent an *actual* breach
“ of the Peace.

TITLE XI.

“ *It is Murber where Malice, and a probable Cause* ^{H. H. P. C.}
“ *of Death is proved, though the Death might not* ^{428.}
“ *necessarily have happened from the Wound alone.*

* *Jurus et conus.*

T I T L E XII.

Observations on the Presumption attached to Homicide happening by a felonious Attempt of a different Nature.

P.P.L. 225—
30.

“ Of the legal existence of this Presumption, and its effects in bringing within the Penalty of *Murder* such Facts as otherwise would be *Homicide* by misadventure, sufficient hath been said; but as an eminent Writer has commented on the Principles of this Presumption, it is now proper to take some Notice of the consequences annexed to Evidence of this kind.

“ Where the Offence intended is a *Felony without Clergy*, and the *accidental* consequence is the *Death* of a Man, there seems not to be much difficulty: for the Act intended, if executed, would have subjected the Offender to the utmost Penalty of the Law: and having so far as in him lay, done every thing necessary to the commission of one felonious offence, by which Act a greater Mischief than he intended takes place, he may seem, notwithstanding reason, subjected to the sentence which would have followed from the perpetration of the Crime which he attempted.

III. Inst. 56.

“ But the Case put by Lord COKE is very strong: that if a Man shoot at a tame fowl of another man with an *ill intent*, which must be understood an *intent to steal*, and kill a man by *mischance* (as if hid in a bush, for instance, which is the example he gives before in shooting at Deer) this is *Murder*.

“ Of three Authorities cited by this venerable Com-
“ mentator, two at least do not support the Point :
“ the one being an Action on the Case for negligently
“ keeping a man’s own Fire, whereby the House of
“ his Neighbour is burnt ; and the other, the Case of
“ fighting with *sword* and *buckler* for amusement by
“ common consent : and the Chief Justice, *HOLT*, in
“ delivering this Doctrine of Murther incurred by
“ killing a person in consequence of an Act done with
“ a different but felonious intent, seems not obscurely
“ to intimate that he finds not any Case to warrant
“ this opinion of his, though he refers to this passage
“ in the *Institutes*, and adopts the example of shoot-
“ ing at a *ben* : and he subjoins, that the *reason* only
“ is submitted to the Judgement of those Judges who
“ may at any time have *that* point judicially brought
“ before them.

Kel. 117.
K. v. Plummer.
13 W. III.

“ That Case appears to have been upon the *special* Kel. 109, 10.
“ *Verdict*, that *Joseph Beverton* was duly appointed to
“ seize and apprehend all such *Wool*, of the growth of
“ this Kingdom, as should be carried to be transported
“ into parts beyond the seas, and also all such persons
“ as should carry the Wool in order to be transported.
“ And that *Benjamin Plummer*, *John Harding*, and
“ others, on the 13th of *March*, about twelve at
“ Night, about seven miles from the sea, did load three
“ horses with eight hundred Pounds of *Wool* of the
“ growth of *England*, in order to transport it into
“ *France*; and that *Joseph Beverton*, having notice
“ thereof, came, with divers other persons to his
“ assistance, to a certain lane about seven miles distant

" from the sea, in order to stop and seize the *Wool* so
" intended to be transported; and *Joseph Beverton*,
" with his Assistants, hearing the said three horses
" laden with Wool, pronounced a Watch-word, and
" thereupon all of them used their utmost endeavours
" to seize the *Wool*, whereupon one of the persons
" unknown, in company with the said *Plummer*, did
" shoot off a *Fuzee*, and thereby did wound the said
" *John Harding*, being a Partner with them in the
" design of transporting the said *Wool*; of which
" wound he died.

" The Judges were of opinion, that upon this
" finding, *Plummer* was not guilty of the Death of
" *Harding*: the unlawful Act of the person who shot
" off the *Fuzee* being not in pursuance of the unlawful
" design of the transporting of the *Wool*, in which
" *Plummer* and the rest were engaged; but collateral
" to it, and, in so far as appeared, without any of the
" others being contenting or privy to it.

" It is obvious, therefore, that the Consequence of
" Homicide, in pursuance of a felonious intent of a
" different Nature, could not, in this Case, be before
" the Court: and accordingly, as we have seen, the
" Lord Chief Justice carefully distinguished his sen-
" timents on this, introduced as an illustrative suppo-
" sition, from his judicial Opinion.

" Had it appeared on the *Verdict*, that the *Fuzee*
" was fired by the man who killed *Harding* against the
" Officers, whereby one of their own confederacy had
" been killed; that it would then have been *Murder*
" in

“ in the whole party : but neither does this apply :
“ it being in reality no more than the Assertion of the
“ known Principle, where the Mischief happening is , H. H. P. C.
“ of the very same kind with the felonious intent, 466.
“ *Homicide* being intended, and *Homicide*, though to
“ another person, happening ; in which Case a per-
“ son’s killing himself in the attempt to murther an-
“ other, as by a Gun bursting, hath been deemed
“ *suicide*, which is only mentioned because it was im-
“ possible to carry the application farther in Cases of L. T. S.
“ Felony where Mischief happens of a like kind to
“ that intended, however doubtful it may be thought
“ whether it should be carried so far.

“ To a felonious intent this Rule must certainly be
“ confined : and therefore where in the barbarous
“ illegal diversion of *cock-throwing*, a child standing by
“ was killed, FOSTER, Justice, ruled it Manslaugh-
“ ter.

“ And on the whole, it does not appear there is any
“ direct Authority that an *Attempt* to commit a *clergy-*
“ *able* Felony of a *different* Nature shall render that
“ *Murder* which would otherwise have been *Homicide*
“ by *Misadventure*. The Rule, and the instances, in
“ the great Lord BACON, that *in criminal Cases*, ge-
“ *neral Malice suffices, with a Fact of like Degree*, *
“ does not seem to require, nor perhaps to admit this
“ Construction : and the Rule, that there is no *equi-*
“ *table* Enlargement of Crimes, § is a sacred Maxim
“ of Humanity and of Justice.

* *In criminalibus sufficit generalis Malitia, cum Facto paris Gradus?*
§ *Culpa æquitate non intenditur.*
Lex remedialis recipit extensionem; pœnalis non item.

" from the sea, in order to stop and seize the *Wool* so
 " intended to be transported; and *Joseph Beverton*,
 " with his Assistants, hearing the said three horses
 " laden with Wool, pronounced a Watch-word, and
 " thereupon all of them used their utmost endeavours
 " to seize the *Wool*, whereupon one of the persons
 " unknown, in company with the said *Plummer*, did
 " shoot off a *Fuzee*, and thereby did wound the said
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 " others being consenting or privy to it.

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"in the whole party: but neither does this apply:
"it being in reality no more than the Assertion of the
"known Principle, where the Mischief happening is ^{1 H. H. P. C.}
"of the very same kind with the felonious intent, ^{466.}
"Homicide being intended, and *Homicide*, though to
"another person, happening; in which Case a per-
"son's killing himself in the attempt to murther an-
"other, as by a Gun bursting, hath been deemed
"suicide, which is only mentioned because it was im-
"possible to carry the application farther in Cases of ^{L. T. 31.}
"Felony where Mischief happens of a like kind to
"that intended, however doubtful it may be thought
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"does not seem to require, nor perhaps to admit this
"Construction: and the Rule, that there is no *equi-*
"table Enlargement of Crimes, § is a sacred Maxim
"of Humanity and of Justice. ^{L. T. 304} ^{R. 15.}

* *In criminalibus sufficit generalis Malitia, cum Facto paris Gradus.*
§ *Culpa æquitate non intenditur.*
Lex remedialis recipit extensionem; pœnalis non item.

TITLE XIII.

Of the PRESUMPTION of MALICE under the Statute.

s J. I. (vulgo
primo) c. 8.
Anno 1604.

" The Statute provideth, To the End that stabbing
" and killing Men on the sudden, done and committed by
" many inhuman and wicked persons, in the time of their
" rage, drunkenness, sudden displeasure, or other passion
" of mind, contrary to the commandment of Almighty
" God, and the common Peace and Tranquillity of this
" Realm, may from henceforth be restrained through fear
" of due punishment to be inflicted on such cruel and
" bloody Malefactors, who heretofore have been thereunto
" emboldened by presuming on the Benefit of Clergy,

" That it be therefore enacted, that every person and
" persons, which after one Month next ensuing the end of
" the then present Session of Parliament, should stab or
" thrust any Person or Persons that hath not then any
" weapon drawn, or that hath not then first stricken
" the party which shall so stab or thrust, so as the
" person or persons so stabbed or thrust shall thereof die
" within

" within the space of six months, although it can-
 " not be proved that the same was done of Malice
 " forethought, yet the party so offending, and being
 " thereof convicted by Verdict of twelve Men, Con-
 " fession, or otherwise, according to the Laws of this
 " Realm, shall be excluded from the Benefit of his or
 " their Clergy, and suffer Death as in Case of wilful
 " Murther.

" With a Proviso, That the Act, or any thing
 " therein contained, extend not to any Person which shall
 " kill another se defendendo, or by Misfortune, or in any
 " other manner than as aforesaid: nor to any person
 " which, in keeping or preserving the Peace, shall
 " chance to kill * another, so as not willingly, wittingly,
 " and of purpose, under Pretext and Colour of keep-
 " ing the Peace; nor to any person who, in chastising
 " or correcting his Child or Servant, shall, beside his
 " or their intent and purpose, chance to kill. *

" There

Contin.
3 Car. I. c. 4.
and 16 Car. I.
c. 4.

* The Statute says, *shall chance to commit Manslaughter:* but the expression is changed to avoid the Ambiguity.

There is a passage in SHAKESPEARE which one would almost suppose to allude to it. The Play indeed is at least seven years prior to this Statute: but as it appears by very strong Evidence that a Com-

pliment to James was inserted, after his Accession, in the Close of the Play of Henry VIII. this too might be an Insertion. It is in the beautiful and exquisitely pathetic Speech of Edward on being solicited the pardon of a servant, after suffering himself to be instigated to the Murther of his Brother the Duke of Clarence. The Germ of this nobly

Being printed
1597.

Vol. 297.

Ed. Raym. 845.

" There is a tradition that this Statute was made
 " upon a special occasion: be this as it may, the
 " manners and weapons of the times, and the hostile
 " dispositions of the minds of the *Scots* and *English*,
 " gave occasion to frequent mischief; a short *dagger*
 " being often drawn from under the cloak, and made
 " the too certain instrument of a fatal revenge.

Kel. 55.
a Hale, 456.

" It has been said to be *declaratory* of the Common
 " Law. This the eminently judicious Author of the
 " *Discourse on Homicide* justly doubts: and indeed,
 " great as the Respect is which the opinions of the
 " Judges of *England* deserve, the Statute itself proves
 " invincibly that it was not thus considered by the
 " Framers of it. By the Limitation of the *six*
 " *Months*, within which the Death must happen, by
 " the Period from which it was to *commence*, and by
 " its being originally a *temporary Act*.

P. 2350.

R. III. A. II.
S. I.

nobly expanded sentiment is indeed to be found in *Holinshed*, but the Amplification is entirely of the Poet, and, whe- ther really written previous or subsequent to the Statute, has expressions which have much Af-

But when your Carters, or your waiting Vassals,
Have done a drunken slaughter, and defac'd
The precious image of our dear Redeemer,
You straight are on your knees for pardon, pardon;
And I, unjustly too, must grant it you.

" How-

" However, in the construction, the Judges have
" approximated the Statute as much as possible to the
" rules of the *Common Law*.

" With respect to the Case of a Man assaulted by ^{St. 469.} *T*bieves in his own House, though having no wea-
" pon drawn, nor having struck him, his stabbing of
" one of them, appears to have been sufficiently pro-
" tected by the terms of the Proviso, from being
" drawn within the Statute. And in like manner, the
" Case of the Gentleman who killed an Officer who , H. H. P. C.
" had violently pushed into his Chamber, with in- ^{470.}
" tent to arrest him, *without telling his business*, or using
" words of Arrest : the Gentleman in his surprize,
" not knowing him to be an Officer, took down a *sword*
" that hung in the Chamber, and *stabbed* him. This
" too appears to be covered by the exception of the
" Act.

" The same may be observed of the Case where, ^{1 H. H. P. C.}
" upon an outcry of *T*bieves, a person who was con- ⁴⁷⁴⁻ *Jones (W.) 429.*
" cealed in a Closet, but no Thief, was, in the hurry ^{Cro. Car. 538.}
" and surprize of the family, stabbed in the dark. *R. v. Cook.*

" This, as the learned Commentator on that branch ^{F. Cr. L. 299.}
" of our Criminal Law remarks, might have been
" more properly considered as *Manslaughter* at *Com-*
" *mon Law*, all due circumspection not having been
" used, than ruled, as it was said to have been, *Chance-*
" *medley*: but that however, it was clearly out of
" the Statute.

" Shooting with any sort of *Fire-arms*, or with a
" *Bow and Arrow*, has been held within the Statute:
" and

Shooting and thrusting with a Staff, held within the Statute.

" and (in which the original difficulty of construction
" could be very little) thrusting with a Staff.

Williams's
Case.
Jones, 432.
Kel. 132.
Newman's Case.
Oct. 8 A.
Post. 300 n.

3 H. H. P. C.
470.
Godb. 154.

Post. 301.

" But *throwing*, whereby the weapon, of whatever
" nature, is delivered out of the Hand, at the time
" of the stroke given, hath not been thought to fall
" within the parliamentary description: not even
" where a *sword* was thrown to twenty yards dis-
" tance.

" With respect to a *weapon drawn*, a benignant
" interpretation has been allowed in favour of the De-
" fendant: an ordinary *Cudgel* hath been held a wea-
" pon, so as to take the Case out of the Statute.

" The Judges have been divided on the construc-
" tion of those words, *not having THEN a weapon*
" *drawn*; whether the *THEN* refer to the *instant* the
" *stab* was given, or to the *whole time of the combat*.

3 Lev. 255.
Hil. 1 & 2 J. II. " This difference of opinion took place on a *Special*
" *Verdict* which stated, that words of Anger and Con-
" tempt having passed between the prisoner and the
" deceased, the prisoner struck the deceased with the
" back of his hand; who thereupon attempted to
" draw, but was prevented by the interference of the
" company then present, whereupon the deceased
" threw a *Pot* at the prisoner, which missed him; and
" thereon the prisoner with his *sword* gave the wound
" of which the deceased died.

" Most

" Most of the Judges were agreed that the Pot,
" while held by the Defendant, came sufficiently
" within the construction of a *Weapon drawn*: but six
" of them (of whom were the two *Chief Justices**) held,
" that to entitle the Prisoner to *Clergy* in this Case, it
" ought to have continued in the hand of the de-
" ceased at the time when the Prisoner gave the mor-
" tal stroke. The other Judges (of whom was
" *Montague, C. B.* and *Levinz*) with the *Recorder*,
" were of the contrary opinion: and held that the
" word *THEN* in the Statute, is to be referred to the
" time of the fighting or controversy, and not to the
" immediate instant of the wounding; and this they
" argued from the occasion of the Statute, and the ge-
" neral reason of the Case. To this sentiment, the
" Reporter adds, the King acceded: and the Prisoner
" had his Clergy.

* *Herbert and Jones.*

" Probably in the construction of a Statute, so
" highly penal, the opinion which in that instance pre-
" vailed would now be approved.

" Another Question has been debated on the con-
" struction of the Words, *or that batb not then FIRST*
" *stricken the party who shall so stab or strust*. When
" this point was reserved for the opinion of the
" JUDGES, eleven held these words to mean, not
" having

Jones (W.) 340.
Byart's Case.

*On the Words, First Stricken conclusive Presumption
from the concealment of the Death of an Illegitimate
Child.*

" having given the *first* blow in the affray ; and one
" only, who was *Richardson*, understood them as im-
" porting, not having struck before the mortal wound
" was given. But the opinion of *HOLT*, and of *Foster*,
" supports that of the single Judge.

Skinn. 668.
Rex v. Keate.
B. 301.

TITLE XIV.

*Conclusive Presumption from the Concealment of the Death
of a Bastard Child.*

" In this instance a Statute Presumption of Mur-
" ther is established from the mode and definite cir-
" cumstances of killing : in another instance a pre-
" sumption, also by Statute, is introduced ; the conceal-
" ment of Death is made almost conclusive *Evidence*
" of this Crime : and this too where the concealment
" is natural, without supposing such a motive, from
" a much more obvious, and more generally probable
" inducement. This is where an unhappy Female
" becomes the Parent of an illegitimate Child : her
" concealment of the Death of such Child becomes
" conclusive Evidence, under the presumption of Law
" created by that Statute, that she murdered it ; un-
" less she can prove by one witness, at least, that it was
" born dead.

*21 Ja. I. c. 27.
Anno 1623.*

" It has been held that it is not necessary an Indict-
" ment should conclude,—against the form of the Sta-
" tute,—in order to convict a Woman by force of this
" Act :

*1. J. P. 216.
2 Hawk. 438.*

“ Act: for that the Statute doth not create a new of-
“ fence; but only makes such concealment an unde-
“ niable Evidence of Murther.

“ Of late years, as this law appeareth to be some-
“ thing severe, it has been usual to require some sort
“ of *presumptive* Evidence that the Child was born
“ alive, before this other constrained presumption is
“ admitted.

IV. Comm.
198.

“ Knocking for *help* has been held sufficient Evi-
“ dence to *repel* the presumption of concealment.

2 Hawk. P. C.
438.

“ Of course, *confession* of pregnancy some time before
“ hand, takes it out of the Statute.

TITLE XV.

Maliciously causing the Death of another, under colour of Law.

“ There is one method of causing the Death of
“ another which may occasion an *Indictment* of *Mur-
“ tber*, which from its peculiar nature ought not to
“ be passed in silence. This is, *falsely and maliciously*
“ *procuring another to be convicted and executed for a*
“ *pretended capital Crime*. That this, in a *moral* or
“ *religious* consideration incurs the guilt of Murther,
“ is not controverted, or ever, we may safely presume,
“ will. But that it falls by the *Law of England*
“ within the proper description of that Crime, is not so
“ fully agreed. The Author of the *Discourse on Homicide*
“ does not favour the opinion which would support an
“ *Indictment* for *Murther* on this foundation: and
“ at least equally unfavourable is the Author of the
“ *Observations on the Ancient Statutes*. Nor does Lord

“ Coke

¶ Mirrour, c. 1.
§ 9.
¶ L. III. c. 4.
c. 52.
¶ IV. 128, 196.

" Coke give his support to the doctrine. On the other hand, our old Lawyers, the *Mirror*, ¶ *Broadstone*, § and *Britton*, ¶ hold the affirmative: and the Author of the *Commentaries* decidedly adopts their sentiments. Indeed, nothing but the idea of a political expediency, derived from the character of our Constitution with respect to criminal Process, could have suggested a doubt upon this point.

" Yet it seems no forced or precarious conclusion to allow, that Public Justice would suffer no discouragement if this enormous abuse of its authority, to the destruction of the Life of the innocent, were universally known to be punishable as *Murther*. It could only be considered as such when it was completely evident that a Prosecutor or Witnesses had by Perjury deprived another of his Life, whom they knew to have not committed the Crime of which they accused him. And on an Indictment for this offence, there has been a Conviction. And on Motion in Arrest of Judgment, the motives which induced the Attorney General to decline arguing this point, Sir William Blackstone represents to have been merely prudential, and not an apprehension that the point was not maintainable in Law.

R. v. Mac-daniel & Berry.
IV Comm. 196.
N. f.

TITLE XVI.

Of the Time within which the Death must happen.

IV. Comm. 197.
1 H. P. C. 79.
R. v. W. Nicholas.
Post. 64.

" To prove *Murther* the Death must be within a Year and a Day from the stroke given, or Cause of Death administered. The greatest Interval that occurs to recollection is a poisoning on the 13th of April and Death the 31st of January following: for which the offender was convicted and executed.

CHAPTER VIII.

Of TREASON.

" We are now arrived to the Consideration of the
" last Degree of CAPITAL OFFENCES, which is
" HIGH TREASON.

" And here we shall first treat of that which is *proper*-
" *per* or direct, consisting in an Attempt against the
" Person of the King, or his Crown and Government:
" reserving for a separate Article the Discussion of
" Treason in a less proper sense as it relates to
" COINAGE.

SECTION II.

Of TREASON; properly or principally so termed.

" Some Points of Evidence material under this
" head have been already dispatched in treating of the
" Number of *Witnesses* required in certain Cases.

V. *supra.*
B. II. C. III.
S 4. T. 2.
P. 289, 90.

" It was there shewn, and explained by Precedents,
" that *two Witnesses* are required in Case of *Treason*,
" properly and principally so called: that these two
" Witnesses must be to Treasons of the *same kind*:
" and that to collateral Facts, which come by way of
" corroboration, and not in direct proof of the Issue,
" one Witness is sufficient.

TITLE II.

Of the Proof of Hand-writing.

" Of the Proof of the Hand-writing, in Cases of
" treasonable Correspondence, some notice has been
" taken in the FIRST Book, where the general Rules
" concerning WRITTEN EVIDENCE were given.

53, 4.

Ecc

" It

" It will be here proper to add a Case on the effect
" of comparison of the *hand-writing*.

² Raym. 39.
X. Hargr. St.
Tr. App. 41.
R. v. Crofty
alias Phillips.

" On an Indictment for *High Treason*, the Counsel
" for the Crown endeavoured to prove certain Papers,
" containing treasonable Correspondence, to be the
" *hand-writing* of the Prisoner, for which they had no
" other proof but comparison of hand. The Prisoner
" (perhaps on the mistaken notion of its being a pri-
" vate Act) produced a Copy of the Act for *reversing*
" *the Attainder of Algernon Sydney*, by which the
" Comparison of Hands, without other Evidence that
" the paper was written by the party, is recited among
" the Grounds upon which the *Attainder* is declared
" *null and void*. The Jury acquitted the Defendant.

^{Fest. 193.}
^{Diss. L. H. T.}

R. v. Sir R.
Grahame, Bart.
M. St. Tr.
256.

" The very eminent Author of the Treatises on the
" *Crown Law* does not seem to have designed affirm-
" ing or denying any thing with respect to the Evi-
" dence by which the Writing (of that immortal Dis-
" course on Government) was attempted to be proved
" against *Sydney*: but observes only, that, had the
" Papers been relative to the *treasonable* Practices with
" which he was charged, they might have been read
" in Evidence against him; as in the Case of Lord
" *Preston, Layer, Hensley, and Gregg*.

² Burr. Mansf.
644.

" It appears, therefore, as we have said above, that
" Letters wrote and forwarded on their way, for the
" purpose of a treasonable Correspondence, but *inter-
cepted*, may be read in Evidence to prove the *TREA-
SON*, though they could not be proof of the *Publica-
tion of a Libel*.

Lord Preston's
Case, ut supra.

" That Letters in the *Custody* of a Man who is
" in the act of going abroad, with circumstances of
" ~~GOING OVERSEAS WITHAW~~ " fear

“ fear and concealment, which argue the intent of
“ his voyage to be of like nature with that which the
“ Letters are intended to prove, may be read against
“ such person standing on his Indictment of *Highb*
“ *Treason*, without proving the hand-writing.

“ That *similitude of bands*, unsupported with other
“ Proof, is no Evidence in Case of Treason, or other
“ capital Cases: but no very strong Proof has been
“ held sufficient to introduce this Evidence as admis-
“ sible.

R. v. Layer,
Harg. St. Tr.
VI. 273—9.

“ In Mr. *Layer's* Case, there was Evidence of a
“ delivery of the Papers in question by the Prisoner
“ with a charge to take care of them, particularly cir-
“ cumstanced: Evidence of an Agent who had received
“ Letters from Mr. *Layer*, and had done business and
“ been paid on the account of them, and who be-
“ lieved it to be the same hand: (this in itself would
“ have only similar Evidence to that in the Case of
“ *SYDNEY*; and lastly Evidence of an implied admis-
“ sion by the Prisoner, that they were of his writing).

Ibid. 275.

276.

“ It must be remarked, that the Case of Lord *Pre-*
“ *ston* was not, as it has apparently been sometimes
“ supposed, a Case of mere custody, as in *Sydney's*
“ Case, but a Case of *Custody* and *Conveyance* connect-
“ ed with the *overt Act* laid in the Indictment; of pas-
“ sing on the Sea, and departing towards the king-
“ dom of *France*, with intent to deliver the traitorous
“ instruction in the said Letters contained to the
“ King's enemies, in the said Kingdom, then at war

To what Charge of Treason the sending of Letters ordinary applies.

" with England: so that the distinction which has been
" before intimated, is fully included in the Facts.
" And for this see the Indictment.

III. St. Tr.
850--9.

TITLE III.

To what Charges of Treason the sending of Letters may apply.

Fob. 227, 8.

I. Burr. Mansf.
646.
V. Gregg's
Cafe, Harg. St.
Tr. X. 77.

" The forwarding of a traitorous Correspondence,
" inviting to the Invasion of the Realm, though
" intercepted, so that it never reach the Enemy, will
" be Evidence on the charge of levying war: and
" it has been also held, that it may be Evidence of
" adhering to the King's Enemies. In Henzey's Case it
" was ruled to be good Evidence of both. It is ob-
" vious that it may also be Evidence of compassing the
" King's Death.

SECTION III.

Of TREASONS within the St. 25 E. III.

Of Treason in compassing the Death of the King.

" We are now to consider the principal species of
" Treason and their Evidence within the Statute of
" E. III.

25 E. III. c. 2. " First, to compass or imagine the Death of a
" Queen Regnant, (the intention being manifested and
" attempted to be carried into execution by Overt Act,
" is within the Statute *).

Comm. IV. 76. " But the Consort of such Queen is not within the
" Protection of the Act.

F. H. T. D. I.
Introd. § 9. " A King before his Coronation may have Treason
" committed against him: whether he succeed to the
" Crown by Descent (which of course is understood

O. A. S.

* This most important Statute is denominated from the Title of its
first Chapter, The Statute of Purveyors.

" where

" where no Bar exists by parliamentary Authority) or
" whether it devolve on him by previous designation of
" Parliament.

" A King *de facto*, in plenary possession of the royal
" power, hath a temporary Allegiance due to him; Comm. IV. 77.
" against which *Treason* may be committed.

Par. 2.

Of the Case of Persons acting under the sovereign Authority for the Time being.

" The Case of Persons acting under the Sovereignty
" or governing Power, under whatever Name, and
" whether exercised by one or several, seems to fall
" within the strict Analogy of the Rule: and there-
" fore, to speak of no other instances, one Case at
" least, we may conclude, will be now acknowledged
" to have been severe beyond the limits which Equity
" prescribeth as inviolable in the interpretation of Laws
" penal in the highest degree.

The Case of Sir
Henry Vane.
Kcl. 15.
1 St. Tr. 929.

" Nothing can more evince the truth of this remark
" than the singular supposition to which the Court
" resorted, that *Charles*, afterwards the Second, was,
" from the time when his Father was put to death on
" the scaffold, KING *DE FACTO*: a supposition which,
" at a later Period of our History, might have been
" attended with consequences the most dreadful: since
" the difference of the Name of a Governor, or even
" of the Form of the Government, could not be a
" Ground of sufficient solidity to support, in such an
" instance, the stress imposed upon it for determining
" where

|| He was indicted for compassing the Death of Charles the Second, and laying war against him during the Interval between the Declaration of Charles I. and the Establishment of Charles II. on the vacant Throne: between which Events more than twelve Years had intervened.

His reasons are thus concisely and forcible summed up by our great constitutional Historian:— "Sir Henry observed, that the Law of England did not leave the

MACAULAY,
VI. p. 119.

" where the sovereignty *de facto* resided ;—and determining it contrary to the notorious and continued Evidence of twelve Years.

Fob. 402, 3.

Fob. 194.
Kel. 8.

" The compassing and imagining so properly constitutes the Treason, that even if an Attempt of such Nature be carried into full effect, the actual execution of it is in Law regarded only as an overt Act evidencing such imagination,

Fob. 195.

Kel. 17--21.

" To have been present, with *Notice of the design of meeting*, is Evidence to be left to the Jury of an Assent to such treasonable compassing and imagining.

T I T L E II.

Of constructive compassing the Death of the King.

Fob. 195.

" Thus far is Evidence of direct Attempts against the Life of the King: but Machinations and endeavours, which have a direct tendency in the consequences of them, or in the means to be employed for carrying them into execution, to endanger the King's Life, have been repeatedly adjudged to be Evidence of overt Acts within this species of High Treason; as entering into measures for deposing or imprisoning him, or to get his person into the power of the conspirators.

V. etiam,
2717, 8.H. VII. c. 1.
Anno 1494.

the subject without direction; the Legislature in this Case had provided for the public security by the famous Statute :|| that no man, in case of a Revolution, should be questioned for his obedience to a King in being; and whether the established government was a monarchy or a commonwealth, the reason of the thing was still the same; nor ought an expelled prince to think himself entitled to allegiance so long as he could not afford protection."

The instance said to have been quoted against Sir H. Vane was clearly nothing to the purpose: it being the Case of one Watson, who was indicted for compassing the Death of King James the First before he came into England, but after the Demise of the Crown by the Death of Elizabeth. That Case was good Law; but it has no resemblance. There was no change of Government; no Interregnum.

" Or

“ Or in the instance of offences less immediately Foot. 196.
“ personal: as concerting with foreigners a plan to
“ invade the Kingdom, or going into a foreign coun-
“ try for such purpose; or even setting forward on the
“ way with an intent to go thither.

“ Mere general Words of a treasonable import, but Foot. 200.
“ not uttered in prosecution of any act or design, are not
“ overt Acts of TREASON.

S E C T I O N IV.

Of levying War against the King.

“ On the Evidence of open war, with all the pomp
“ and circumstances of military array, nothing needs
“ to be said: but the Cases of this direct levying of
“ war which have fallen under judicial Consideration
“ are much fewer than those of *constructive* Treason in
“ this respect.

“ And, first, it has been determined, that no Evi-
“ dence of military weapons, banners, or even re-
“ gular consultation previous to a rising, is necessary
“ to be given.

“ And on this turned the Decision in the Cases of
“ *Dammaree* and *Purchase*.

“ In these Cases, the Indictments severally charged
“ the two Prisoners, with the usual introduction, of
“ traiterously *compassing*, *imagining*, and intending to
“ levy and raise war and insurrection against the Queen
“ within the Kingdom: and that, in order to complete
“ these their traiterous intentions, they, on the *first*
“ day of *March*, in the ninth year of her Majesty’s
“ Reign, at the Parish of *St. Clement Danes*, in the
“ County of *Middlesex*, with a multitude of people
“ to the number of 500, armed and arrayed in a war-
“ like manner, with colours flying, swords, clubs,
“ and other weapons, then and there traiterously as-

Foot. Disc. I.
Ch. 2. p. 202.

Regina v. Dam-
march.
H. St. Tr. VIII.
218, 9.
Regina v. Pur-
chase.
H. St. Tr. VIII.
219.

“ sembled, did traiterously ordain, prepare, and levy
 “ war against the Queen, against the duty of their
 “ allegiance.

“ It appeared in Evidence, that during the Trial of
 “ Dr. Sacheverell, the rabble, who had attended him
 “ from Westminster to his lodgings in the Temple, con-
 “ tinued together a short space in the King's Bench
 “ Walks, crying, among other cries of the day, Down
 “ with the Presbyterians!

“ At length it was proposed to pull down the Meet-
 “ ing-houses: and this constitutes an ingredient in the
 “ Crime, which is to be hereafter noticed under an-
 “ other general head. Several thousands immediately
 “ moved forwards: and Dammaree, putting himself at
 “ their head, with his livery and badge as a Water-
 “ man in the Queen's service, cried, Come on, Boys;
 “ I'll lead you: down with the Meeting-houses! They
 “ accordingly destroyed the Meeting-house of Mr.
 “ Burges, a dissenting Minister in Lincoln's Inn Fields:
 “ and then agreed to proceed to the rest of the Meeting-
 “ houses; and hearing that the Guards were coming
 “ to disperse them, they agreed to divide into several
 “ bodies, and to attack different houses at the same
 “ time: and many were that night demolished, and
 “ the materials burnt.

“ The Prisoner, Dammaree, headed a party which
 “ drew off from Lincoln's Inn Fields, and demolished
 “ a Meeting-house in Drury Lane; still crying, that
 “ they would pull them all down that Night.

“ The

" The Case of Purchase will come more properly to
" be considered when we speak of the general Doctrine
" concerning *Accomplices*.

" Dammarree was convicted: and had judgement as
" in Cases of *High Treason*.

TITLE II.

Of Force applied by a Party or Faction to effect Ends ap-
parently justifiable.

" Insurrections, not only to dethrone the King, but
" to remove evil + Counsellors, to alter the laws, or
" even the measures of Government, are comprised
" under the construction of levying war: as a Con-
" spiracy for these purposes, though not within this
" species of Treason, is held to be within the pre-
" ceding, of compassing the Death of the King.

H. H. P. C.
109—10.
119—22, 142.
+ Moor, 620, 1.
Regina v. the
Earl of Essex.
Kei. 76.

" And under this Principle, Insurrections to throw
" down all Inclosures; to enhance the price of all labour;
" to open all Prisons; to expell all foreigners; or all of
" a particular nation living under the protection of the
" Government; or for the Reformation of Evils, not
" only imaginary but even REAL, in which the insur-
" gents have no special interest, they being of a public
" nature and of general concern, are construed to fall
" within the charge of levying war, and to be Evi-
" dence of overt ACTS of this species of Treason.

Fob. 212.

" There

“ There is next to be considered the strongest Case
“ of this kind of constructive Treason, where the
“ buildings destroyed were of a sort discountenanced
“ by Religion and prohibited by Law.

R. v. Messinger et alios.
O. B. E. 20.
Car. II.
Kel. 70---5.

“ This was the Case where a *special Verdict* found,
“ that a great number assembled together under pre-
“ tence of pulling down Bawdy-houses: that one
“ *Bazeley* was called their Captain, and preceded them
“ with a drawn sword; and that *Messinger* was their
“ other leader, flourishing a green apron on a staff
“ by way of Colours. That they committed several
“ Acts of Violence and Resistance specified in the
“ Verdict, and pulled part of an house down, and
“ the next to it.

Kel. 71.

“ All the Judges present, who were eleven, except-
“ ing the Lord Chief Baron, Sir *Matthew Hale*, were
“ of opinion that a rising, with an intent to pull down
“ Bawdy-houses in *general*, and putting their intention
“ in execution by force; was a *levying of war* against
“ the King, and *High Treason* at Common Law within
“ the declaration of the Statute 25 E. III. and the
“ Chief Justice *Kelynge* expresseth his own reasons in
“ particular for this resolution, that this way of pro-
“ ceeding tore the Government out of the King's
“ hands, and destroyed the great privilege of the
“ People, not to be proceeded against but by Trial in
“ due course of Law.

“ The

" The Chief Baron HALE thought the Offence of
" the Prisoners, apparent on the *special Verdict*, was not
" within the Statute. He is the best Interpreter of
" his own Reasons :

" 1. Because it seemed but an unruly company of apprentices, among whom that custom of pulling down bawdy-houses had long obtained : 2. because the finding, *to pull down bawdy-houses*, might reasonably be intended two or three particular bawdy-houses ; and the indefinite expression should not, *in materia odiosâ*, be construed either universally or generally : 3. because the Statute of *Mary*, though now discontinued, makes Assemblies of above twelve persons, and of as high a nature, only Felony : and that notwithstanding a continuance together an hour after proclamation made ; as namely, an assembly to pull down bawdy-houses, burn mills, or abate the rents of any manors, lands, or tenements.

H. H. P. C.
" 134"

1. M. Sess. 2.
c. 12.

" The other Judges answered (and the *Chief Baron* seemeth to have ultimately inclined to their opinion when publishing his great Work) that to this objection an Answer had been already given : that the Statute of *1 Mary* was to be intended where persons, to the number of twelve, or more, pretending any or all of them to be injured in *particular*, or to have a *particular* Interest, assemble and do any Acts of Violence of the kind enumerated.

" But since the passing of the *Riot Act*, the consideration of which will, therefore, properly belong to the Close of this Chapter, there seems to be, if

" it

Distinction intimated between riotous and treasonable Assemblies.

" it is judged expedient in behalf of the Crown to proceed capitally against any such offences, a more definite and appropriated Method of so proceeding than by indicting such Rioters as guilty of *levying war*. It is not meant to say that the Statute has abolished this species of *Highb Treason*: but it is probable that persons who should now conspire to pull down *brotbels*, even though the general extent of their purpose would admit of an Indictment on the Statute of Treasons, would be preferably indicted on that Clause in the *Riot Act*.

VI. P. P. L.
234, 5.

Fot. 218.
Salk. 635.

Kel. 75.

" An Assembly, armed and arrayed for any treasonable purpose, is Evidence of levying war: yet in the tumultuous Assembly for the destruction of the *brotbels*, the Judges seem to have thought it necessary to take the *actual Violence* together with the assembling for that purpose: which is agreeable to the proof required of an inferior Felony; but not so consonant to the rules concerning *Treason*.

TITLE III.

Particular Facts amounting to Evidence of levying War.

Fot. 213. § 6.

" A Conspiracy to rise requires that the rising actually take place, or it will not be Evidence of *Treason*: but it doth not require any actual mischief to have been effected by that rising.

Fot. 216, 7.

" Furnishing Rebels with Money, Ammunition, or other Necessaries, or voluntarily joining them, is Evidence of levying war against the King.

" Holding a Castle against the King so as to defend the possession of it with hostile force, is *levying war* against

“against the King: as manifestly is attacking the King’s
“forces in opposition to his Authority.

“But this Act of attacking the King’s forces admits
“of explanation from circumstances: as if troops be
“on march, or in their quarters, and on a sudden
“quarrel the neighbourhood attack them, this will be
“a very great misdemeanor: it may be Felony; but
“it will not be Treason; there being no intention
“against the King’s person or Government.

Fo. 210. § 2.
H.H.P.C. 146.

“JOHN BERWICK had only one Witness against
“him to prove him to have been in arms with the
“Rebels: but two Witnesses swore, that when they
“went, by order of the Duke of Cumberland, to take
“an Account of the Names of the Officers of the
“Rebel Garrison after the surrender of Carlisle, the
“Prisoner, Berwick, gave in his Name as Lieutenant in
“the Manchester Regiment. Mr. Justice Foster doubted
“whether this were to be considered as a Confession
“after the Fact, or as Evidence of the Fact itself;
“namely, of the Prisoner’s appearing and taking the
“rank of an officer. And ultimately, he appears to
“have regarded this way of considering it as the
“right one.

R. v. Berwick.
Fo. 10.

SECTION V.

Of adhering to the King’s Enemies.

“Such Evidence as would be proof of levying war
“within the realm will generally be proof of adhering
“to the King’s Enemies out of the Realm: as supplying
“Money, Arms, Ammunition, Intelligence.

“Vaughan

Salk. 634, 5.
 R. 7. Vaughan.
 S. C.
 1V. St. T. 328.

Ibid. 347.

3.

Salk. 635.

Foft. 219, § 12.
 H. H. P. C.
 362—4.

“ *Vaughan* was indicted for *Treason* in adhering to
 “ the King's Enemies, with many *French* subjects,
 “ Enemies of our Lord the King; and that they did
 “ navigate a certain ship, called *Glancarty*, with a
 “ design to destroy the King's ships. And it was
 “ holden, that *cruising* was a sufficient Act of *adhering*,
 “ without *fighting*, or other fact of hostility: as if
 “ *Englishmen* would list themselves and march, this
 “ may be levying war, without actual fighting.

“ It was also holden that *Dutchmen*, under commission
 “ from the *French* King, come under the description
 “ of *French* subjects; for their *Commission* maketh
 “ them as such against all Nations but their own.

“ States in actual hostility with us are *Enemies*,
 “ though war be not declared: and therefore, in an
 “ Indictment for *adhering* to the King's Enemies, it is
 “ sufficient to aver that the Prince or State, the adher-
 “ ing to which is the *Treason* charged, is an *Enemy*,
 “ without shewing any war proclaimed; and the Fact,
 “ whether war or not, is triable by the *Jury*; and
 “ public notoriety is *Evidence* of the Fact.

SECTION VI.

*OVERT ACT to be laid: but not the Detail of Evidence
 by which it is supported.*

Foft. 220, § 13.

“ It is not sufficient generally to lay in the Indictment
 “ that the Prisoner did *levy war*, or did *adhere* to the
 “ King's Enemies, or did *compass* the King's Death
 “ (of which compassing or imagining, as we have
 “ seen, various kinds of overt Acts may be Evi-
 “ dence) but some overt Act, in support of either
 “ charge, must be laid: as in the former instance;
 “ that

" that they did assemble in a warlike manner, armed
" and arrayed; and in the latter, particular Acts
" of Adherence, as sending a Letter of traitorous
" intelligence to be delivered to the King's Enemies in
" parts beyond the sea.

" But the particular facts, or a detail of the Evi-
" dence, is not necessary to be set forth: this was
" agreed in the Cases of *Dammaree* and *Purchase* before
" cited: and it was not thought necessary in the indict-
" ments in the two rebellions of 1715 and 1745, nor
" in the last indictment prosecuted for High Treason.

S E C T I O N VII.

*What Evidence of Compulsion may be given to excuse
joining with Rebels.*

" Hitherto we have seen what is proof of Tre-
" son: it is now to be seen what Acts, otherwise
" traitorous, shall be excused by Evidence given on
" behalf of the Prisoner.

" The only excuse is that of actual force and fear
" of death: and it will avail the party only during
" the continuance of such compulsion. And this
" excuse is recognized by Lord Coke, who vouches for
" it an ancient Case, which was this: Certain persons
" had furnished Sir John Oldcastle, Knight, and others
" who were with him, with provisions. And it was
" specially found, that the said John Oldcastle and
" others were in open war against the King at the time
" the said persons so supplied them and joined their
" company. But it was also found that the said per-

Fo. 217.

III Inst. 14
cap. 1.

" sons

" sons did this through fear of death, and that they
 " quitted the insurgents so soon as they could. And
 " it was adjudged to be no Treason.

" The force and compulsion, then, once duly proved
 " needs not be shewn by Evidence to have been every
 " instant actually exerted; for such proof were im-
 " possible: the presumption is, that it continues till
 " facts be proved which shew that the Prisoner after-
 " wards continued voluntarily: and on the whole,
 " whether force or no force, how long that force con-
 " tinued, and whether the party originally constrained
 " might afterwards have quitted the Rebels if he had
 " been so minded, are facts to be left to the Jury
 " upon the whole Evidence.

R. v. McGow-
ther.
Fott. 134.
IX St. Tr.

Mrs. Rudd's
Cafe.
Cwmp. 337--
340.

" The Analogy of this principle of excuse, from
 " immediate fear of death, has been applied in a Case
 " of inferior Felony. Yet many instances of treason-
 " able Acts may be supposed, in which, it should seem,
 " the defence from fear of death would not be ad-
 " missible, however strongly in Evidence.

Fott. 14.

" Thus much is clear, that the fear of spoiling of
 " Goods, or burning of houses, is no excuse for join-
 " ing with Rebels.

" The excuse then of personal Necessity and Com-
 " pulsion under Terror of Death, and the *Justification*
 " of civil Necessity under the Command of the *actual*
 " Sovereign for the time being, are the only legal defence
 " of Acts that would otherwise be *Treason*.

*Justifiable Resistance of an oppressed People, as at the
REVOLUTION, not Matter to be given in Evidence;
but which must in its Nature be ever above Proof.*

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" It may be said, *Can no Evidence then be given of force justifiably levied against a Government persisting to act in utter repugnance to its Trust?* And is there no legal Criterion, from the Merits of the Cause, to distinguish between Treason and the necessary Use of Force for the Recovery of a subverted Constitution? The Answer must be, that no such Evidence can be given to a Jury. But as the first Secular Year is now nearly complete since a REVOLUTION, justified on this great Principle of the Right of the Nation to take arms against arbitrary Power, and to vest in other hands a Government abdicated by the Violation of its Trust, it is certainly of importance clearly to understand in what manner each of these Propositions is consistent with the other.

" The Right of taking arms against an established Government for Abuse of Power is not a private but PUBLIC RIGHT: for particular Injuries, from whatever Quarter, individuals, as such, have their resort to the Laws. Suppose the Attempt to have been unsuccessful which terminated in the Revolution, and the Patriots who concurred in that Attempt to have been put on their Trial for High Treason, were the Facts recited in the Bill of Rights, impliedly as amounting to an Abdication, of such kind as to have been given in Evidence to a Jury? Doubtless they were of too high and general a Nature to have been proved by Witnesses: particular Evidence must pro-

F f f

" ceed

" *ceed on particular Facts, the Quality of which the Laws can presuppose and define. But a Subversion, Forfeiture, or Abdication of Government, which shall dissolve the tie of Allegiance, cannot be shewn as a Matter to be proved upon Trial before a Jury of twelve men:*" * they are not Points of Proof; " but of national Perception.

SECTION VIII.

Of the Proof necessary in Cases of HIGH TREASON,
properly so called.

v. supra,
p. 289---90.

" In Cases of High Treason we have already seen, " when they come under any of the Denominations hitherto described, *two Witnesses* are necessary to the Proof of any of the distinct species of Treason " which may be laid in the Indictment.

*Fest. 241.
VIII. St. Tr.
254.
Regina v.
Willis, and
Smith's Case
cited 255, S. P.*

" It was there shewn, that a collateral fact was not within the Rule: but that such fact might be proved either by one Witness or by Confession of the Party: " as to prove a fact corroborative merely of the Issue, " or to disprove the Plea of Alienage.

TITLE II.

Of Confession, as relative to Treason.

" With regard to Confession, whether it shall ever be taken, since the Statute of William, as Evidence of itself to convict the Prisoner, unless made by him in open Court on his Arraignment, has been variously argued.

* *Justa Arma quibus necessaria; neque testimoniū desiderat, neque ullā et pia ubi nulla nisi in Armis REI-PUBLICÆ CONSERVANDÆ siue PROBATIONE indiget: sensibus PULI ipsa se infert; siuā ipsius relinquitur. Ea autem Necessitas Luce, non aliena, conspicienda,*

" In

“ In Berwick’s Case two of the Judges, the Lord Post. 23.
Chief Justice Willes and Mr. Justice Abney, thought
such a confession after the fact proved by two Wit-
nesses, though not made in open Court, nor even
before a Magistrate, was in itself sufficient to Con-
viction. But of the Authority of this Case, far-
ther observation must be made.

“ For the elucidating of a point so important to
criminal Evidence in the greatest and most to be
guarded object of its application, we must once
more repeat the Words of the Statute—No person v. supra, 289.
7 W. III. c. 3.
§ 2.
or persons whatsoever shall be indicted or attainted
of High Treason, whereby any Corruption of
Blood may or shall be made to any such offender or
offenders, or to any the Heir or Heirs of any such
offender or offenders, or of Misprision of such
Treason, but by and upon the Oaths and Testi-
mony of two lawful Witnesses, either both of them
to the same OVERT ACT, or one of them to one,
and another of them to another overt Act of the
SAME Treason; unless the party INDICTED and
ARRAIGNED, OR TRIED, shall willingly, without
violence, in OPEN COURT, confess the same; or shall
stand mute or refuse to plead; or, in Cases of High

" Treason, shall peremptorily challenge above thirty-five
" of the Jury.

" If there had been no Case upon this Clause, it
" seems not easy to doubt of its obvious and natural
" Construction. What is to be proved by *Witnesses* is
" an *overt Act*: but a *Confession* is very different from
" an *overt Act of Treason*. The *Confession* to prove
" the Treason is that made by the party *indicted* and
" *arraigned*: even if there were nothing more, would
" not this sufficiently imply that the only *Confession*
" admitted by this *Act* as competent to convict must be
" that of the Prisoner after his *arraignment*? But there
" follow *emphatic Words*, which seem, of abundant
" Caution, to have been inserted—**IN OPEN COURT**.
" No explanation can add clearness to the evident and
" necessary import of these Words.

" The Terms of the Statutes of *Edward the Sixth*
" upon this Subject are,

1 E. VI. c. 12.
§ 22.

" That no person shall be indicted, arraigned, con-
" demned, or convicted for any offence of Treason, &c.
" for which the same offender shall in any wise suffer any
" pains of death, imprisonment, loss or forfeiture of his
" goods, chattels, lands or tenements, unless the same
" offender be accused by two sufficient and lawful *Witnesses*,
" or shall WILLINGLY, WITHOUT VIOLENCE, CON-
" FESS THE SAME.

" And

" And again, by a Statute in the same Reign, creat- 5 & 6 E. VI.
" ing certain new Treasons and particularising others
" comprehended in the construction of the declara- c. 11. § 8.
" tory Act of Edward the Third, (repealed as to the 1 M. Sess. 2.
" new created Treasons only) there is a similar Pro- c. 3.
" viso, that no person shall be indicted, arraigned, con-
" demned, &c. of any of the Treasons contained in
" that Act, or for any other Treasons, unless accused by
" two lawful accusers, which shall be brought in person
" before the party accused at the time of arraignment;
" unless the said party arraigned shall willingly, with-
" out violence, confess the same.

" The first does not seem by the expression to have
" excluded a Confession of the party prior to ar-
" raignment: the latter, probably with a design of
" clearing any doubt, speaks of Confession in such
" manner as, in the obvious and proper import of the
" sentence, would be understood only of a Confession
" subsequent to an Arraignment.

" Then comes the Statute of William, and design-
" ing to strengthen and ascertain the security of the
" subject standing on his Defence upon this perilous
" Charge, uses the Words which have been quoted,
" in which the addition, IN OPEN COURT, is, it
" might be apprehended, conclusively significant.

" What the opinion of Sir Michael Foster would
" have been on the Clause of this last Act, supposing

" the Question to be *Res integra*, we have a very clear
 " and satisfactory intimation. But he adds, with his
 " usual Candour, that *perhaps* it may be now too late
 " to controvert the authority of the opinion in 1716,
 " warranted as it hath been by later precedents. Yet
 " what the learned Judge declined to discuss, pro-
 " bably lest he should seem to contend more tenaciously
 " than might appear becoming for his own opinion,
 " there is not the same reason for others to decline
 " who feel the Weight of his eminent Abilities and
 " great Judgement in the criminal Law, and who
 " may still think that his sentiments in *Berwick's Case*
 " were not only agreeable to the true (not to say, ne-
 " cessary) Construction of the Statute of *William*;
 " but that such Construction is not precluded by later
 " Authorities.

Foot. 241.
 Francia's Case
 cited.

" The Case in 1716 was *Francia's Case*. On a con-
 " ference of the Judges preparatory to his Trial, at
 " which the Attorney and Solicitor General, *who were*
 " to conduct the prosecution the next day, assisted, it
 " was agreed that the construction of the Statutes of
 " E. VI. formerly given was wrong: which was,
 " that a confession, upon examination of the party,
 " taken out of court, and before a magistrate or
 " person having authority to take such examination,
 " and proved by two Witnesses, was of itself Evi-
 " dence sufficient to convict; for it was then agreed
 " that upon the foot of those Acts of E. VI. by con-
 " fession is meant only a confession upon arraignment of
 " the party, which, it was said, amounted to a con-
 " viction.

" And

" And thus far (at least as to the last of those Statutes) seems to be very just, as already has been argued: but then it does not appear how this proves that *Evidence* by two Witnesses of a Confession should be of itself, since those Statutes, competent to convict, or even sufficient to complete Evidence otherwise incompetent for Conviction.

" What was said farther in the conference appears not: but as it was urged against *Berwick*, we may suppose it was to this effect, that the *Confession* of the party might be used against him, if proved by two Witnesses, as *Evidence of an overt Act of Treason*: for that the Clause concerning Confession upon Arraignment, which was of course a conviction without farther proof, did not preclude using proof by Witnesses of Facts confessed by the party, which might substantiate the charge of the Treason laid against him, though it left the Facts so confessed to be proved, like direct Evidence of overt Acts, by two Witnesses: and the credit of such proof to be considered by the Jury.

" Whatever was then said, had it rested there, was said in the absence of the party, or of any who might have objected in his behalf; nor does it appear that the effect of the Statute of *William* was then particularly considered. And with regard to the Trial of *Francia* the Evidence of his Confession was, that on his *seizure*, by the Messenger, in order to his examination before the *Secretaries of State* (in which was a circumstance strangely irregular, that of administering an *oath* to him) he admitted that a *Copy-book*, then produced and shewn him, and from which the Copies of the treasonable correspondence were after-

H. St. Tr. VL
58.
3 G. I.

" wards read against him, was his *Copy-book* of his
 " Correspondence with Friends abroad. And that on
 " his *Examination* before the Secretary of State, he
 " said, what others have wrote cannot make me guilty.
 " As for what I have wrote, I appeal to my Book.
 " That is my Book : I appeal to that for my innocence.
 " His *Examination* taken in writing speaks of a Cor-
 " respondence in which he was engaged concerning a
 " Law-suit recommended to his care : that during the
 " correspondence he received several Letters directed
 " to a Mr. *Harvey*, and transmitted Answers to *Paris* ;
 " and that latterly the Method of Correspondence
 " changed, and the Correspondent at *Paris*, instead of
 " inclosing his Answers to *Harvey*, wrote only to the
 " Examinant, and desired him to shew the Letters to
 " *Harvey*, which he did accordingly.

" And he closes by saying, that in some of the
 " Letters lately so communicated by him, he verily
 " believes the Duke of *Ormond*, Lord *Bolingbroke*,
 " and others to be meant ; and on farther Examina-
 " tion, that by certain Figures he believes the *Pretend-*
er and the King to be meant ; and that he be-
 " lieves the subject of the Letter communicated by
 " him to *Harvey* is the design of the Pretender to
 " invade his Majesty's Dominions.

" The Messenger swore to seizing the *Copy-book*
 " in the Custody of *Francis*, and delivering it at the
 " Office.

" And

" And from the Copy-book they read Answers from
" abroad to Letters not entered in the Copy-book
" relative to the same Transaction: but which they
" gave Evidence were found among his Papers aforesaid.

" In Gregg's Case, which was relative to the same Correspondence, he pleaded guilty, and therefore no additional inference can be drawn from any proof designed to have been offered against him, had he put himself on his Trial.

" Whatever might have been agreed at the previous Conference, perhaps *Francia's* Case will be thought not a Case of *Confession*, but an owning, by way of claim, as his, certain Papers found in his custody, and explaining what he believed to be the meaning of certain Figures, without acknowledging that he so understood when he communicated them. If so, the Papers were before the Jury, to judge of the purport of them, and to draw such inferences as they should think just from the Evidence of the Letters and Answers being found in his Custody, together with the other circumstances, whether they believed him to have carried on knowingly a treasonable Correspondence. And in summing up, the Lord Chief Baron* places not the stress on any supposed Confession, but that the Letters were found in his custody, and that he owned (or claimed) the Copy-book as containing his Correspondence with Friends abroad.

* *Bury.*

" It

" It is true one of his Counsel spoke, as if a Confession generally, that he did write several treasonable Letters, might have been given in Evidence in support of the Indictment: but no stress can be laid on this; especially since it was foreign to the Case; and only in arguing another point, which seems clearly not tenable: that the *Letters*, or the substance or paragraphs of them, ought to have been inserted in the Indictment to entitle them to be given in Evidence, though the *overt Act* was charged, of writing, and causing to be written, Letters notifying the intention to levy war.

" *Francia* was, however, acquitted: be it for others decisively to affirm, whether under the Statute of *William*, he could legally have been convicted.

" In *Berwick's Case* this of *Francia*, it seems, was supposed to have much strength, for admitting the Confession of the Prisoner after the Fact, but before Arraignment, to be Evidence sufficient to convict. With what reason *Francia's Case* was supposed to be of strength to support a conclusion of this importance, the Reader will judge: and *Berwick's Case* itself cannot be regarded as an Authority to this Point: because both the Judges supported the Admissibility of that Evidence on a prior and clearer ground, that it was Evidence of the Fact of Rebellion, and not merely a confession after the fact: so that the latter point was unnecessary to the actual ground of their Judgement; nor indeed consistent with it.

" The

" The admission of this Evidence on the *Commission* " in the *North*, in 1745, is said to have been on the " Authority of the Judges opinions previous to the " Trials of *Gregg* and *Francia*. But these were extra- " judicial opinions concerning Evidence which *might* " happen to be offered at the Trial: and it appears " not in what manner, to what effect, such Evidence " was offered on any of those Trials, or whether its " admissibility was argued in behalf of the Prisoner: " nor do we find in the *State Trials* or elsewhere, ex- " cept in *Tonge's Case* (the Authority of which is con- R. v. Tonge et
fessedly out of the Question) that a Confession out al.
of Court, proved by two Witnesses, shall be suf- Kel. 17, 2.
ficient to convict.

" It will be at least allowed that this excellent Ex- " pounder of our criminal Law has not insisted too " largely when contending that the *Rule* should never be carried farther than to a Confession made during Fost. 243.
" the solemnity of an examination before a magistrate, " or person having authority to take it, when the " party may be presumed to be properly on his guard, " and apprized of the danger he standeth in: for that " *baſty Confessions*, made to persons having no Authority " to examine, are the weakest and most suspicious of all " Evidence. Proof may be too easily procured. Words " are often misreported; whether through ignorance, inat- " tention, or malice, it mattereth not to the Defendant, " who is equally affected in either case; and they are ex- " tremely liable to misconstruction. And without, this Evi- " dence is not in the ordinary course of things to be dis-
" proved

*Final Inference against admitting Confession otherwise
than as corroborative Proof, unless in open Court on
Arraignment.*

" proved by that sort of negative Evidence by which the
" proof of plain facts may be, and often is, confronted.

" If the Point should in future ever come before a
" Court, it may be for the Judges of that day to con-
" sider whether the Question be in reality precluded
" by Precedents;—whether, in point of Principle, Con-
" fessions any where but in *open Court*, be not always
" weak and suspicious Evidence, especially where State
" Crimes are the subject of investigation; whether any
" Confession or Declaration of a Prisoner prior to his
" Arraignment shall be carried farther than in the Case
" of *Willis*, as corroborative merely of other Evidence;
" and whether what was then said by one of the
" Judges so soon after the Statute of *William*, that the
" Confession shall not supply the want of a Witness,
" there shall be two Witnesses notwithstanding, should
" not apply to all Cases of Confession of High Tre-
" son to be proved by Witnesses: so that whether
" taken before a Magistrate or not, there must be two
" Witnesses of an overt *Act distinct* from those to
" the Confession: which also may be inferred to have
" been the opinion of the Chief Justice || in the same
" Case, from his manner of expressing himself. And
" the Attorney § and Solicitor + General, on that oc-
" casion, seem to have admitted that this Evidence
" could only be offered to confirm proof of an overt
" Act, of which Evidence, such as the Statute re-
" quires to be given, had been offered.

" In

¶ Sir James
Montague.
† Sir Robert
Bryce.

" In this way, and to this extent, it is not disputed
" by the Author of the *Discourses on High Treason* but
" that it might be given: and the Reader will form
" his own opinion, whether there is sufficient Autho-
" rity for considering it in itself as *Evidence* of an overt
" Act competent to convict by its own weight, or to
" complete Evidence, which must otherwise have been
" insufficient by the Statute: though it may properly
" confirm Evidence, otherwise competent to be left to
" the Jury, as sufficient, if believed, under that Act.
" The Author of the *Commentaries* seems also to have
" been of this opinion: that a Confession, otherwise
" than in open Court on Arraignment, although
" proved by two Witnesses, if it should be offered,
" cannot be received, otherwise than as merely in con-
" firmation of proof made before by two Witnesses
" to the overt Act. He saith, the Confession of the
" Prisoner, which shall countervail the *Necessity* of
" such Proof (by two Witnesses) must be IN OPEN
" COURT.

IV Comm.
Ch. 27. p. 357.

TITLE III.

Concerning overt Acts not laid in the Indictment.

" By the Statute—*No Evidence shall be admitted or* v. *supra*, 289.
" *given of any overt Act that is not expressly laid in the*
" *Indictment.*

" The Construction of this has been held, and it is
" approved by the Author of the *Discourse on High*
" *Treason*, that no such Evidence shall be given in
" direct substantive proof of the Treason: but that as
" confirmatory of the overt Act laid, it may: or, in
" his own Words, that *no overt Act, amounting to a* Fost. 245.

" *distinct*

It extends to overt Acts, confirming the Act laid.

" distinct independent charge, though falling under the same
 " head of Treason, shall be given in Evidence, unless it
 " be expressly laid in the Indictment; but that still, if it
 " amounteth to a direct proof of any of the overt Acts
 " which are laid, it may be given in Evidence of such
 " overt Acts.

R. v. Ambrose
 Rockwood,
 cor. HOLT &
 TREBY.
 C. C. J. J.
 Nevil, Owell,
 and Eyres,
 Just. 14 Apr.
 3 W. III.
 1696.
 IV St. Tr. 98.

" And thus in Rockwood's Case the Indictment was
 " for compassing the Death of the King: two of the
 " overt Acts charged in the Indictment were, that
 " they traiterously met, proposed, and consulted of
 " the time, place, and means of killing the King, and
 " that they agreed to provide forty men for that pur-
 " pose.

Ibid. 133.

" The Counsel for the Crown offered Evidence of a
 " List of men given by the Prisoner for that purpose.

" The Counsel for the Prisoner objected that the
 " List was not laid in the Indictment: and that by
 " the Statute no overt Act should be given in Evidence
 " that is not expressly alleged.

Ibid. 134.

" But the two CHIEF JUSTICES declared their opi-
 " nion, that it was good Evidence to prove the very
 " Charge laid in the Indictment: and that such Evi-
 " dence as went to establish overt Acts sufficiently
 " charged was not meant to be excluded by the Sta-
 " tute: otherwise, as HOLT, Chief Justice, remarked,
 " it would be necessary to set forth not only the *overt*
 " *Act*, but the *very Evidence* to be given to support it.

" And in Layer's Case, where the Indictment charged
 " a Conspiracy to depose the King, and to place the Pre-
 " tender

“ tender on the Throne, his Correspondence, inviting
“ the Pretender, was read (though not charged in the
“ Indictment, and though separately made Treason by
“ an Act of King William) as Evidence of the traiter-
“ ous purpose to depose the King and place the Pre-
“ tender upon the Throne.

13 & 14 W.III.
c. 3.
Fob. 245, 6.

“ And in the Case of Deacon, one of the *overt Acts*
“ laid was the assembling and marching in warlike
“ manner, in order to depose the King, and to place
“ the Pretender on the Throne: Evidence was offered
“ of the Prisoner’s compelling one Craig, a Printer, to
“ print the Pretender’s *Manifesto*, at Mancbeſter, and of
“ his publishing it there, while the Rebel Army was in
“ the Town; and also of the reading of the Mani-
“ festo: to each of these Facts offered in Evidence
“ *Exception* was taken, partly for a reason not imme-
“ diately to be mentioned, and partly because these are
“ *overt Acts not laid* in the Indictment. But the
“ COURT (WILLES, Chief Justice, Abney, and Foster)
“ was of opinion that they might be given in Evidence
“ on the Rule already stated;—an *overt Act not laid*
“ might be given in Evidence if it were a direct Proof
“ of an *overt Act laid*.

Fob. 9, 10.
R. v. Deacon.
17 Jul. 1746.
IX St. Tr. 558,
9.

“ And in the Case of Sir J. Wedderbourn, the
“ collecting of the Excise, for the Use of the Pre-
“ tender, under an appointment from the Pretender’s
“ son, was admitted to be good Evidence though not
“ laid in the Indictment, and though in itself a sepa-
“ rate *Act of Treason*, because it went to confirm the
“ *overt Act laid*: and as such was to be admitted,
“ though

R. v. Sir J.
Wedderbourn.
IX St. Tr.
580, 1.

That no Evidence can be given foreign to the Issue is an universal Principle.

" though he could not have been convicted on this as " substantive Evidence, for want of its being particu-
" larly laid in the Indictment.

" The Construction therefore received of this Rule
" and Direction of the Statute is, that no Evidence
" shall be given which is foreign to the Issue: but
" Evidence of a Crime not charged is foreign to the
" Issue: and by the Statute one certain overt *Act* at
" least, properly related to the species of Treason
" charged, must be laid, and proved in the manner
" which the *Act* requires: this must be done by direct
" Evidence, which may then be corroborated by con-
" firmatory Evidence, but not by Evidence of a Crime
" different in its Nature, or *independent* of the Fact
" charged.

Fol. 246.
Vaughan's
Cafe, *sicra,*
cited.
IV St. T. 331
---3.

" Accordingly where the Indictment was for ad-
" bering to the King's Enemies on the high seas, and the
" overt *Act* laid was, *cruising* on the King's subjects in
" a vessel called the *Loyal Clencarty*, Evidence being
" offered to prove that the Prisoner had, some time
" before, cut away the Custom-house barge, and had
" gone a cruising in her; this Evidence was rejected
" by the Court: for, if true, it was no sort of proof
" of his cruising in the *Loyal Clencarty*; the only fact
" he had then to answer.

" This being a *primary*, and therefore *universal*
" Rule of *Evidence* is consequently the more proper
" to

" to be distinctly noticed in this Treatise on THE LAW
" OF EVIDENCE: for, as Sir M. FOSTER expresseth
" himself, *the Rule of rejecting all Manner of Evidence*
" *that is foreign to the point in issue is founded on sound*
" *sense and common Justice.* For no man is bound, at the
" *peril of Life and Liberty, Fortune or Reputation, to*
" *answer at once and unprepared for every Act of his*
" *Life.* Few, even of the best Men, would chuse to be
" *put to it.* And had not those concerned in State Pro-
" *secutions, out of their zeal for the public service, some-*
" *times stepped over this Rule in the Case of Treasons, it*
" *would perhaps have been needless to have made an ex-*
" *press provision against it in that Case; since the COM-*
" *MON LAW, grounded on the Principles of natural Jus-*
" *tice, hath made the like provision IN EVERY OTHER:*
" *for even* a Contract, " and much more a capital
" Charge," cannot be proved otherwise than as al-
leged; " much less can it be proved" if it be not
alleged: a man cannot be intended to make compe-
tent Proofs upon insufficient Allegations, " or any
" proof upon no Allegation, or none that has re-
ference to the offered proof.

Gill. L. E.
127, 142, form.
Ed. and v. 261,
336, of *ibid*
Ed.

TITLE IV.

*Evidence where natural Allegiance is laid in the Indict-
ment.*

" If the Indictment express the *Treason* to have
" been committed against the Duty of *natural Alle-*
" *giance*, and the Prisoner prove himself an *Alien*, it
" hath been said he shall be *acquitted*, because the In-

G g g

" dict-

IV. St. Tr.
137.
R. v. Cran-
burne.
21 Apr. 1696.
2 W. III.

Alienage disproves an Indictment laid as against natural Allegiance.

“ indictment chargeth him with that species of Allegiance which is permanent, whereas being an Alien, he could only owe a temporary and local Allegiance: but this was incidentally spoken; the Question having been introduced by way of Argument, Cranburne objecting that the word *natural* was not in his Indictment,

VII. H. S. T. 58.

“ In *Francia's Case* it came directly before the Court: for the Indictment charged him with Treason against his true, *natural*, and undoubted Lord. But the Judge did not direct, that on Proof of his being an Alien, he must of course be acquitted: the Jury were informed by the Court, that if they thought him guilty of the Charge in the Indictment, they would find him so, and withal find, that he was an Alien, born in the Dominions of the French King. The Jury acquitting him, this point came not to Judgement.

Ibid. 102.

Fob. 137.
2 H. H. P. C.
59.

“ The Reason of thus directing seems to have been not any doubt, or possibility of doubt, apprehended, that to an Indictment thus framed against a Prisoner, who proved himself an Alien, the Exception was in the smallest degree disputable; but that it might be solemnly settled, and the Ground of the Judgement appear on Record.

" On the other hand, it is clear that an Alien is
" indictable of *High Treason* against his *Allegiance*,
" generally, without adding, *natural*: for he oweth an
" Allegiance during such time as by voluntary Refi-
" dence he receiveth the Benefit and Protection of the
" Laws. And agreeably to this proceedeth the par-
" liamentary Recital in the Act concerning the *Marquis*
" *de Guiscard*, residing in *England* under the Protection
" of the Queen.

9 A. c. 16;
V. supra.

" But the *Allegiance* depending on these considera-
" tions, foreign subjects entering the Kingdom as
" *Enemies by Invasion* do not become liable to be
" otherwise treated than as simply *Prisoners of War*.

" This, however, will not avail a *natural born sub-*
" *ject*: for if such, under a Commission from a *fo-*
" *reign power, invade** his Country, or join the *Intruders*,
" he will not be permitted to justify or excuse himself
" by such Commission, but acting under it, he is
" guilty of *Treason*. His *Allegiance* is permanent,
" unlimited by local circumscriptions, † indissoluble by
" his mere private *Act*: and this *Allegiance*, under-
" stood according to its true Ground, is thus far at least
" no slavish Principle, nor repugnant to the Principles of
" the Revolution: but is that *true Allegiance* which the
" Laws of our Country and the Nature of civil So-
" ciety require of us.

R. v. Townly.
15 Jul. 1746.

" And in this sense, consistent with the great Ends of
" the Constitution, the common Security and Welfare,
" are the Maxims of the perpetual Obligation and
" universal Extent of Allegiance, rational, just, and
" necessary.

R. v. *Aeneas*
Macdonald.
Post. 59.

* So far certainly, *Nemo posset exire Patriam.*

† *Ligeantia naturalis nullis temporum aut locorum limitibus coercetur.*

Regina v.
Dr. Storey.
Dyer, 298.
b. (29) 300.
b. (38.)

Combd. Eliz.
B. II. ad An-
num 1571.

Fort. 187, 2.
2 Hale, 95--
300.

" And accordingly Dr. Storey, an Englishman born, having been guilty, in parts beyond the seas, of a treasonable practising with the Enemies of this Country to promote an invasion, it was resolved by the Judges that such Offence is Treason triable in England. And thereon, refusing to plead, otherwise than that he was, and had been for seven years, a subject of Spain, he was attainted and executed.

" And as subjects are not exempted from their natural Allegiance though resident abroad, some have thought even Ambassadors, while residing here, are so far within the Obligation of local Allegiance, that for Treason they are amenable to the Jurisdiction of the Country. But it has been well remarked, that their Case will always be governed rather by political considerations than by the Rules of municipal Law. Though indeed, even on Principles of Jurisprudence, their peculiar character, as representing the independent sovereignty of the Nation which sends them, seems inconsistent with the Idea of local Allegiance: so that they may become Enemies subject to the Law of Nations: but not Traitors, unless perhaps for some direct Attempts against the Life of the King, by which they divest themselves of their public Capacity, and become private Delinquents: a Case in the intercourse of enlightened Nations to be regarded as merely speculative.

" By

IN LEGATO.
L. II. Cap. I.
p. 310, &c.

LEGATUS.
L. II. p. 316.
225.

* Regulas ad hanc rem pertinentes proponit Kirchnerus: in libro paucis ut opinor cognito; et cum expurgatione tantum permisso: digno tamen qui in lucem iterum prodeat. Primum ponit posse in Legatum etiam capitali poena animadverti si in ea admiserit quae communi Gentium Jure praecipue vindicantur.

Inter confilium vero et effectum distinguit. Ait itaque, contra fas Gentium agere eos videri qui Legatos vel ob coniurationes contra Imperium et principem depresso-s et confiliorum pravorum molitiones pena capitali quasi lese Majestatis persequantur. Quanvis enim Legis civilis rigor tum ad Rempublicam tum ad principium tanquam

" By the Statute so often cited no Treason can be ^{7 W. III. c. 3.}
given in Evidence, unless the overt Act charged in
the Indictment be within three years of the finding
of the Indictment: except in the Case of any At-
tempt to assassinate the King by Poison or any other
means.

" The Advantages to the Prisoner under this Sta-
tute it is of the more importance to him vigilantly to
secure, since by another Clause of the same Statute
he cannot avail himself of any miswriting or mis-
spelling in Arrest of Judgement; but only by
Writ of Error. With respect to false and improper
Latin, since the Statute for conducting all Law
Proceedings in English, the Benefit of this Excep-
tion, formerly of no inconsiderable extent, would
have been virtually taken away, even had the Sta-
tute of William been silent.

⁴G. II. c. 26.
⁶G. II. c. 24.
§ 5.
III. Comm.
322, 3.

" It is farther to be observed, that the Benefit of a
Bill of Exceptions to Evidence is held not to extend
to capital Cases. That it was denied in Sir H. Vane's
Case would, in itself, have had little force in point
of Authority: for certainly there are Points in that,

tanquam Patriæ parentum salutem alii agitaffo convinceretur nibilo
diligentissime custodiendam non so- minus nullā aliā penā affectus est,
lum rei tam atrocis actum et effec quam dimissionis.
sum verum etiam confilium eadem Et deinde:—sed quid de Lega-
severitate persequatur, Legatum torum injurii quæ ex affectu et
tamen adversus peregrinum Prin- consilio au effectum plane perductæ,
cipem delinquendo, quam neque dicimus? Itidem eorum dimis-
sum principem neque dominum sion sola acquiescimus? Diximus
ul. à subjectione aut nexu obligatus jam antea, Legatum suo jure damnari
agnoscat, majestatem ejus laetifice non puniri posse si ea crimina
intelligi; neque illis legibus judici- admiseritisque Jure Gentium punian-
cari posse quæ non nisi subjectos tur. Jus n. Legatorum in hoc re-
quibus scriptæ sint teneant. Effe- ciprocum est, ut quemadmodum ille
sigitur justissime actum cum Legato qui Legatum pulsarit Jure Gentium
Hispanico, in Anglia regnante dedatur, ita vicissim Legata si In-
Elizabetha: qui eti contra Reginæ
caput Regisque inculpitudinem di- jurias intulit iis ad quos missus est
tuta conjuratione consilia cum
laesia in panam dederat.

L. II. Cap. I.
§ 162—p. 338.

“ and too many other Cases before the *Revolution*,
 “ which it would be very unsafe to adopt as Principles
 “ of criminal Jurisprudence. It will not be easy to turn
 “ over many Pages in any Volume of the *State Trials*
 “ prior to that Era without conviction of this melan-
 “ choly Truth. But this Exclusion of the Remedy,
 “ by Bill of Exception, from being admitted in cri-
 “ minal Cases, rests upon the stronger Ground of ne-
 “ gative Usage and the import of the Statute.

^{2 Wilm.}
 13 E. I. c. 31.
 Anno 1285.
 Kel. 25.

CHAPTER IX.

Of TREASON concerning the COIN.

“ Though a *Catachresis* be an allowable figure in
 “ Rhetoric or Poetry, it is in Politics a very dangerous
 “ one, and especially in a penal Code. Of this the
 “ improper species of Treason now to be noticed is a
 “ signal instance. We shall observe on some of the
 “ most remarkable points of *Evidence* relative to this
 “ Crime as constituted by Statute.

V. IV. Comm.
 go.

P. P. L. p. 240.

“ To make, mend, or assist in so doing, or buy,
 “ sell, conceal, or knowingly have in his possession any
 “ instruments of coinage specified in the Act, or other
 “ implements proper for *Coinage only*, is raised to the
 “ Denomination of *Higb Treason*. But it is best, with
 “ regard to this important Article, to follow the Ex-
 “ ample of the Author of the *Principles of Penal*
 “ *Law*,

" Law, and to quote the Words of the Statute for
" the most remarkable part of this extraordinary pro-
" vision :

" That if any person (unless lawfully authorized in
" the Mint, or by the Lords Commissioners of the
" Treasury, or Lord High Treasurer, shall make any
" cutting Engine for cutting round blanks by force of
" a screw out of flatted Bars of Gold, Silver, OR
" OTHER METAL such offender shall be and is
" adjudged guilty of HIGH TREASON.

3 & 9 W. III.
c. 26.

" In a Case where the Prisoner was indicted of HIGH
" TREASON, for that he, not being lawfully authorized,
" &c. knowingly, feloniously, and traiterously had in his
" Custody and Possession one Mould made of Lead, on
" which was made and impressed the Figure, Stamp,
" Resemblance, and Similitude of one of the Sides or
" Flats (to wit, the head side) of a Shilling.

R. v. Hugh
Leonard.
E. 12 G. III.
1772.
1 Bl. R. 307.

" It was agreed that the Mould was one of the in-
" struments mentioned in the former part of the Section
" of the Statute, and therefore comprised within the
" general Words subsequent, so as to make the Custody
" thereof, without lawful Authority or Excuse, amount
" to High Treason. And that being expressly named
" in the former part of the Clause, it was not necessary
" to aver that it was a Tool or Instrument mentioned
" in the Statute.

3 & 9 W. III.
c. 26.

S. C.
Tr. 22 G. III.
1772.
8 El. R. 822.

" But it was doubted whether the Evidence, of having a Mould in Custody, would support the Charge as laid in this Indictment for that being a Mould, it had, of consequence, only the inverted Resemblance of a Shilling : the convex parts of the Shilling being concave ; the Profile turned contrariwise ; and the Letters of the Inscription being all reversed : and whether it was not properly rather an instrument that would make or impress the Resemblance of the current coin, than an instrument on which the same was made and impressed, the Statute seeming to distinguish between such instruments as will make or impress the similitude, &c. as a Matrix, Dye, or Mould ; and such on which the same is made or impressed, as a Puncheon, Counter-puncheon, or Pattern.

" The Words are (so far as concerns this Question) shall knowingly make or mend, &c. any Puncheon, Counter-puncheon, Matrix, Dye, Pattern, or MOULD, in or upon which there shall be, or be made or impressed, or which will make or impress the Figure, Stamp, Resemblance, or Similitude of both or either of the Sides or Flats of any Gold or Silver Coin current within this Kingdom ;—shall knowingly buy, &c. or without lawful Authority or sufficient Excuse, have in his Custody any such Puncheon, Counter-puncheon, Tool or Instrument before mentioned.

" A great Majority of the Judges was of opinion that this Evidence sufficiently maintained the Indictment : because the Stamp of the current Coin was certainly impressed on the Mould in order to form the

" the Cavities: though they agreed that the Indictment would have been more accurate, had it charged " that he had in his Custody a Mould that would " make and impress the Similitude, &c. And in this " opinion some who otherwise doubted acquiesced.

" The Prisoner died in Gaol before Judgement " could be pronounced upon him.

" In another Case, where the Prisoner was found " guilty, at the York Assizes, of forging and counterfeiting a forged and false Coin to the similitude of " an half Guinea (which, and importing false money " to be uttered here, being counterfeit, to the similitude of the Money of *England*, are the only Treasons " with regard to the Coin comprised within the great " Statute of Treasons) it appeared in Evidence that he " had counterfeited the Impression on a piece of Gold, " which was previously hammered, but was not " round, nor would pass in the condition in which it " then was: *Gould*, Justice, who tried the Cause, " doubting whether this were Treason, respite the " Judgement, and laid the Case before all the Judges. " They were unanimously of opinion (*absente* Baron " *Adams*) that the Crime was incomplete, and that he " be recommended for a Pardon to his Majesty.

R. v. Varley.
E. 10 G. III.
1770.
2 Bl. R. 632.

Par. 2.

" Another and the last species we shall mention of " Treason against the Crown created by Statute is here- " after to be treated under the head of *seditionis Libel.*

v. *infra*, §31.

Of

C H A P T E R X.

Of SEDITIONOUS RIOTS.

²G. I. s. 2.

c. 5.

Anno 1714.

B. J. P. p. 92, 3.

See the Anim-
adversus.

J.V. Comm. 142.

And for the Hi-
story of former

Act, which

made riotous

assembling

under circum-
stances Treason

or Felony, v. 3

& 4 E. VI. c. 5.

(Rep. 7 Mar.

c. 1.)

7 Mar. s. 2.

c. 12.

3 Eliz. c. 16.

but temporary.

" A Statute in the Year of the *Accession* of the
House of Brunswick, occasioned probably by cir-
cumstances of the times, has considered *Riots*, under
certain circumstances, as a capital Offence.

" The Evidence necessary to support an Indictment
on the Statute if no Buildings be attacked, must be :

" 1. That there were more than twelve present :

" 2. That *Proclamation* was made by Authority of a
Magistrate, charging all persons assembled to dis-
perse, and peaceably to depart, upon the pains con-
tained in the *Riot Act* ;

" 3. Or that such *Proclamation* was forcibly hin-
dered :

" 4. That twelve or more continued tumultuously
assembled for one hour after such *proclamation*, or after
such hindrance, having knowledge thereof.

" The person actually *hindering* or *bursting* any that
shall begin or go to make the *Proclamation* is, on
this Evidence, liable to Conviction, whether the
Assembly continue afterward or not.

" Where

TITLE II.

Where Churches or other Places of Worship, or private Buildings are damaged.

" If persons riotously assembled actually pull down *Ibid. § 4*
" or begin to pull down a Church or Chapel, or Place
" of religious Worship for Protestant Dissenters, it is
" not necessary to prove they were twelve in number
" (though perhaps it is necessary to prove they were
" more than two) : nor is it necessary to prove that
" any Proclamation was made or attempted to be made.
" But it is necessary to prove that a Place of Worship
" for Dissenters has been certified and registered pur-
" suant to the Statute. Being present and giving En-
" couragement to persons in the Act of demolishing or
" beginning to destroy such place of worship or *private*
" Building (for such also, with their appendages, are within
" the Act) is sufficient Evidence to support an Indict-
" ment founded on this Statute. The Case will, at
" the same time, mark a Distinction between *Accessaries*
" properly called, soon to be farther treated, and
" *Principals*.

" John Royce was indicted, under a special Commis-
" sion of Oyer and Terminer and Gaol Delivery, held at
" Norwich, for that he, with divers persons, to the num-
" ber of one hundred and more, whose Names are un-
" known to the Jurors, did, after the last day of
" July, 1715, to wit, on the twenty-seventh day of
" September, 6 G. III. unlawfully, riotously, and tu-
" multuously assemble: and being so assembled, then
" and there, unlawfully and with Force, feloniously
" did

R. v. J. Royce.
4 Burr. Mansf.
2073—36.

" did begin to demolish and pull down a Dwelling-house (describing, &c.) situate, &c. against the Peace, &c. and against the Form of the Statute in such Case made and provided.

" The Jury found a special Verdict on the second Count (above recited) of the Indictment, stating the riotous Assembly, and finding that divers persons, to the Jurors unknown, did then and there, with force and arms, feloniously begin to demolish the Dwelling-house in the second Count mentioned. And they proceed to find that at the time the said persons unknown so began to demolish the said Dwelling-house, the Prisoner was present, and did encourage and abet the said persons by then and there shouting and using EXPRESSIONS TO INCITE the said persons so to do. But they find that he did NOT with force begin to demolish or pull down, or do any Act with his own bands or PERSON for that purpose, OTHERWISE than as aforesaid.

" It was argued that on this finding this man was a Principal in the second Degree, or, as it used to be called, Accessary AT the Fact. That although Aiders and Abettors present are not named in the Statute, there is enough to shew that they are included: and whoever is included is deprived of Benefit of Clergy by the express Terms of the Statute, by which

" which the Offenders shall be adjudged Felons, and
" shall suffer Death without Benefit of Clergy.

" On Deliberation it was resolved, that before the P. 2075.
" Statute all in this Offence were alike guilty (when-
" ther *actually* doing the Mischief or encouraging others
" to do it,) and were then *equally* guilty of a Misde-
" meanour only.

" That since the Statute there is no Doubt that
" Principals in the first, and Principals in the second
" Degree are all *equally* Felons without Benefit of
" Clergy.

" That the Act describes the *Crime*, demolishing or
" beginning to demolish the Buildings protected by it;
" but leaves the *Evidence* to the Law.

" That the Statute of *stabbing* was not *analogous* :
" for there the intention of the Statute was to distin-
" guish the Case of the person who *actually* gave the
" stab, as differing from the rest in point of Aggra-
" vation.

V. R. v. Page
& Harwood:
Style 55.

" But the COURT doubted whether the Jury ought
" not to have found expressly that he was *aiding* and
" *abetting*, instead of the *Facts* whence such Inference
" is deducible.

" On farther Deliberation the Court were of opinion
" that criminal *Facts* were found on this Verdict
" " equi-

" equivalent to a finding that he aided and abetted : it
 " was found that he did encourage and ABET ; and
 " though they have added afterwards by what parti-
 " cular Acts, yet that this cannot vitiate their former
 " finding.

" And Judgement was pronounced, and Sentence
 " of Death accordingly awarded.

" It is here material to consider what was, at Com-
 " mon Law, Evidence of a Riot.

*III. Inst. p. 176.
Cap. 79.*

" A Riot is where three or more do an unlawful Act
 " in disturbance of the Peace : and an *unlawful As-*
 " *sembly* is where three or more assemble with intent to
 " commit a Riot, though they do it not.

*R. v. Scott.
1 Bl. R. 291.
Tr. & G. III.
B. R. 2130.
S. C.*

*Poph. 202.
Harrison &
Brington.*

*Str. 193.
R. v. Moor &
Kinnerley.
V. supra, 673*

" And hereon a Doubt was made, where four were
 " indicted, and two died before Trial, whether this
 " were not an Acquittal of the other two, since two
 " cannot make a Riot. The COURT was of opinion,
 " that four having been originally indicted, it must
 " now, after Verdict against two, be intended that
 " some Evidence was given to the Jury of one at least
 " of the other two being concerned in it : and then
 " it would be like an Indictment against them, that
 " they two, together with persons unknown, did make
 " a Riot. The Motion in Arrest of Judgement was
 " therefore dismissed.

Of

CHAPTER XL.

Of seditionis LIBELS.

SECTION I.

I. *Amounting to TREASON.*

“ One Species of *seditionis Libel* is subjected to the
“ Penalty of *High Treason*: and it has seemed proper
“ to bring these offences in the Nature of the *Delicta
latae Majestatis* under the severe *Roman Code* into
“ one View.

“ By the Statute of Queen Anne, therefore, *malum
ciouly, advisedly, and directly*, in writing or print-
“ ing, to affirm that the *Pretender*, or any other per-
“ son or persons, other than as settled by *Parliament*,
“ have *Right or Title* to the *Crown*, or that the Kings
“ or Queens of the Realm, with the Authority of
“ Parliament, are not able to make Laws of sufficient
“ force and validity to *limit and bind* the *Crown* and the
“ Descent thereof, is made HIGH TREASON.

6 A. c. 7.

1 W. & M.
S. 2. c. 2.
11 & 12 W. III.
c. 2.

“ On this Act *John Matthews*, a Youth of nine-
“ teen, an unfortunate deluded Zealot in the Cause of
“ the forfeited Royalty, was indicted.

“ The Indictment set forth the *Libel* with the ne-
“ cessary *Averments* and *Innuendos*: the material sub-

“ stance

Amounting to Treason—to Misdemeanour.

" stance of which was thus : *From the solemnity of the Cavalier's (innuendo the person pretending, &c. in the style of the Abjuration Act) Birth; the moral impossibility of putting an Impostor on the Nation; (innuendo, the Kingdom of Great Britain) after the Manner pretended, and the disappointment in the attempt of proving him, . . . so I (innuendo, himself, John Matthews) think it is Demonstration, if hereditary Right be any Recommendation, be (innuendo, the Person pretending, &c. as before) batb that (innuendo, hereditary Right.)*

" And afterwards, so that all Rights (innuendo, all Rights to the Crown of this Realm) concur in him (innuendo, the said Person.)

" The stress of the Argument in his Defence was placed on this: that the *Libel*, as laid and proved, was not Evidence of such direct Assertion as is prohibited by the Statute under pain of *Treason*. That it was hypothetical, if hereditary Right be any Recommendation. But it was not a contingent inference on a supposed uncertainty, but an absolute illation on a fact assumed as certain.

" He had Judgement and was executed accordingly.

SECTION II.

2. *Amounting to Misdemeanour.*

" We now proceed to the consideration of *seditionary Libels not felonious*: in which is to be considered:

1. *The Matter,*
2. *The Form,*
3. *The Publication,*

" With

TITLE II.

The Matter.

" With respect to the Matter, it may be any thing which tends to lessen the just Confidence, good Opinion, and Affection of the People towards the Constitution and Government of the Country. At the same time these Attacks will be so impotent, while the Constitution is preserved inviolate, and the Government is faithfully administered, that the best and most effectual Mode of disarming Libels of their sting is persevering Integrity and undisturbed Magnanimity in the service of the public.

TITLE III.

The Form.

" An Historian may relate Facts the most disadvantageous to public Characters unblameably, and with Title to high Commendation. The office of instructing Posterity, and of benefiting future Ages

* The great Frederic, of Prussia, in the latter and most glorious part of his Reign, was shewn a Libel posted on the Wall of the Palace, personally and sharply reflecting on him: occupied then in encouraging Merit, in promoting Agriculture, in diffusing Spirit, Vigour, and Felicity: he read it, with some difficulty, from the height at which it was fixed, and then is reported to have said, Passers by will find it difficult to read this where it stands: fix it lower:— On no pent à son aise lire ceci en passant: affichez là, plus bas. This praise is not paid to the Mo-

ver of the animated Machine which one hour might act with the concentrated Energy of an hundred thousand Arms, and the next might be broken or laid in dust by the fortune of the Field. It is a more rare, more appropriated, and unalloyed Praise: not to the triumphant Despot; but to the Ases of the pacific Benefactor of a People. A Libel may be punished into Credit: but if an enlightened Mind, sensible to the Value of true Glory, unaffectedly disregards it, from a Monument of Reproach it becomes a Trophy, such as Panegyric would emulate in vain.

“ by the Example of the past, would be very imper-
 “ feally and suspiciously performed if confined to the
 “ Recital of such Actions only as would bear a favour-
 “ able Interpretation. The Candour and Benignity
 “ even of Livy exhibits pernicious Counsels and
 “ their fatal consequences: and not solely the bright,
 “ the sublime, the divinely amiable Forms of Li-
 “ berty, of generous Patriotism, of heroic Virtue:
 “ a Metius and a Tarquin, not only a Brutus, a Decius,
 “ or a Scipio.

“ It is true, under the Mask of History Calumny
 “ may walk forth: and consequently a Libel may be
 “ composed in the historic Form. But to which Class
 “ a Publication shall be referred, a wise and good
 “ Government will regard rather as a Question of Cri-
 “ ticism than of forensic Investigation: sensible that
 “ Truth, if permitted to spread freely, will of itself
 “ destroy whatever mixture springs up among it of a
 “ base and adverse growth; and that Extirpation in these
 “ instances will be ever to the hazard of the Wheat
 “ rather than of the Darnel.

Hob. 215.
Hicks's Cafe.
P. 16. J. I.

“ It is also possible that a Libel may assume the Form
 “ of Panegyric. There may be times on which a
 “ Panegyric would convey the obvious and even ne-
 “ cessary Construction of a censure the most severe. ||

Poetry.

|| Cum loquare de humanitate ex-
 probari sibi superbiam, cum de cle-
 mentia crudelitatem, cum de libe-
 ralitate avaritiam, cum de benigni-

tate livorem, cum de continentia li-
 bidinem, cum de labore inertiam,
 cum de fortitudine timorem.

“ In

" In general as to the Form,—Dashes, Breaks, fictitious Names, false Dates, and the other Modes of conveying with certainty and clearness the intended imputation, and yet endeavouring to avoid the consequences, are all unavailing. A Jury and Judges on the Bench will understand these Compositions, as they are obviously intelligible to the rest of the Community: and *State Libels*, their Object being more general, and their effect depending on their being generally understood, whatever be their Form, cannot be supposed to be in need of *external Evidence* to explain their purport.

v. Sacheverel's
Case:
IV. St. Tr. 927.

TITLE III.
Of PUBLICATION.

That Publication is essential to constitute a Libel.

" We have seen that in TREASON Writings not published may come as collateral Evidence in proof of an overt Act duly laid, and of which there is other legal Evidence; but to the offence of libelling Publication is essential. It is only by its Tendency with respect to Society that a Writing is libellous. Till then it is as the thought of the Writer's heart not manifested by any outward expression: the one is inaccessible to human Knowledge, the other independent on human Authority. Previous to Publication the Papers of a Man are in every sense his Property: and for many rea-

Concerning the Proof of Publication.

*Case of Seizure
of Papers.*

* Entick, cl. v.
Cartington et
al. C. P. Mic.
6 G. III.
xi. H. St. Tr.
321.

" sons are, with justice, considered as among the
" dearest and most inviolable parts of that property,
" the secure enjoyment of which it is one of the
" primary ends of civil Society to protect.

*Par. 2.**Concerning the Evidence of Publication.*

" Thus much will now be controverted : but
" what shall amount to Publication has been a Ques-
" tion agitated with much Zeal ; especially on the
" Trial of *Libels* against the Government.

" As to the general Fact of publishing, a Libel is
" clearly published if but a single Copy reaches a
" single hand to whom it is conveyed, with intent of
" publishing to that person, and impressing part of them
" on his mind by making the contents known : but if
" stolen from the Author, or seized by Violence, whe-
" ther under colour of Law, or without such pretence,
" this is not Publication so as to affect him.

Of printing or transcribing.

" If it be asked whether Delivery of a Copy to be
" transcribed or printed be an Act of *Publication*, it
" will be obvious a general Answer cannot properly be
" adapted to such Question. It may be, the Language,
" in which the libellous Matter is contained, is unknown
" to the Transcriber or to the Printer : in which Case
" such person to whom it is thus communicated, exercises
" evidently a mere mechanical Act ; the understanding or
" imagination being not liable to any possible influence
" from the meaning couched in such defamatory Com-
" position.

"On a *Writ of Error* in the *Exchequer Chamber*
"from a *Judgement* in the *King's Bench*, a *Question*
"came to be argued upon the following *Facts*:

Baldwin v.
Elphinston, c. q.
2 Bl. R. 1037.
Tr. 13 G, 111.

"In an *Action* on the *Case* there were *two Counts*.
"The first, for *printing and publishing* in the *St. James's Chronicle* a *Libel*, grossly traducing the Plaintiff "in his Capacity of a Captain in the Navy. The second, for *printing*, and causing to be printed, an "other similar *Libel*. The Defendant pleaded the "general *Issue*: and on the Trial the Jury found a "general *Verdict* for the Plaintiff with *Damages* of "500*l.* which *Judgement* was accordingly entered.
"The *special Error* assigned was, that in the second "Count the Defendant is only charged with the "PRINTING, and not the *Publication* of the *Libel*;
"which is insufficient to maintain the *Action*.

"The Chief Justice of the *Common Pleas*, Dr "GREY, delivered the opinion of himself, Smythe, "(Chief Baron,) and all the other Judges.

"In this opinion solemnly delivered, two *Propositions* "were admitted:—First, that where there are two "Counts in a Declaration, one perfect and the other "not so, general Damages cannot regularly be given:
"—Secondly, that in Actions for LIBELS, if no Pub- "lication is stated in the Declaration, the Count is "bad.

Dyer, 369. b.
5 Rep. 108.
3 Cro. 27.
Penson and
Gooday.

Hob. 62, 215.

Publication is essential to a Libel, but no technical Mode of charging it is required.

" But it was held that a Publication was sufficiently stated.

" That there are various Modes of Publication, and " no technical Words necessary to describe it. That " Words may be published by teaching, preaching, or " advised speaking, even where the Consequences are " highly penal. That a written Libel may be published in a Letter to a third Person (i. e. where it is " the subject of an Action, and to the person himself libelled, where it is the subject of Indictment or " Information). That the Word *palam* has been held to " state Publication sufficiently. That there are in *Rastell's Entries* two instances of *constructive Publication*: " one by delivering Letters to *A.* and *B*; the other, by " fixing them on the Door of St. Paul's Church. That it " is therefore sufficient if there be stated in the Declaration such Matter as amounts to a Publication " (without using the formal Word *published*): and the " Jury are upon the Evidence to decide whether Publication be sufficiently proved or no.

" That printing a Libel may be an innocent Act: but " that, unless qualified by circumstances, it shall " *prima facie* be understood to be publishing, as it must " be delivered to the *Compositor* and other subordinate Workmen. That, particularly, printing in a *Newspaper* admits of no doubt upon the face of it: for " that

V. *sopra in hac pagina.*
Taylor v. How.
Cro. Eliz. 261.
R. E.
T. *Action for
de Cosa.* 33. 2.

*The same Proposition farther explained: printing a Libel
may be an innocent Act; but is not presumed.*

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" that it shall be taken a Publication, unless shewn to
" be suppressed, and never published.

" That the Count, for *causing to be printed*, con-
" firms the Fact of *Publication* for the reason already
" given; and that the introduction to this Count con-
" nects it with the preceding one, by stating the ~~ma-~~
" *licious intent to injure the party as aforesaid.*

" That, on the whole, by both Counts the *Publi-*
" *cation* is put in Issue: which the Jury therefore, in
" finding generally, did as it was competent for them
" to do. The Judgement of the King's Bench was
" accordingly *affirmed*.

" It is obvious that, for additional very important
" reasons, *Publication*, if necessary to support an
" Action on the Case, must be necessary to maintain
" an *Information or Indictment* for a supposed *State*
" *Libel*. We have already shewn the Principle upon
" which the Rule is different in Case of *HIGH*
" *TREASON*.

*Printing is, generally, prima facie, Evidence of Pub-
lication.*

" *Printing* then is, *prima facie*, Evidence of the
" *Publication* of a *Libel*: though, as we have seen,
" not in all Cases conclusive Evidence. And here it
" must be acknowledged that a contrary intimation

Publication no less essential in the Case of a public than of
a private Libel.

" has been somewhat too generally and strongly expressed in a Tract lately published. * For though " it may not be the intent of the Author to convey " the impression of the defamatory meaning to the " mind of the Printer, and though in the exercise of " this employment it may easily happen that the sense, " and purport of the composition may not engage the " mind of the Printer, yet an Act is done which in " its Nature publishes the Sentiments to another in so " far as he may be disposed to attend to them: and a " man shall not limit an illicit Act, † either by its immediate effect (which beside, in this instance, is not capable of proof) or by his particular purpose. If " a man print a Libel, the presumption is he has a " general intent to publish it: if he print it by the " hand of another, this, *prima facie*, is Evidence of " a particular Act of Publication consequent on such

* Essay on the Law of Libels.
The Author is sensible that an Error where the Public is concerned should not be diminished.

† Under this Construction is the Maxim to be understood, *Mandata licita strictam recipient interpretationem; illicita latam et extensam.* Not that a Construction is to be amplified to create a Crime: but that a general criminal intent renders responsible for particular circumstances naturally connected with it. And in a like sense is to be understood the other Maxim, *Propositorum agentis Rei Naturam non mutat;* that is, where the particular immediate purpose is different, but in the execution of it

an Act is done which is criminal by relation to the general purpose of the Doer; or where the particular criminal purpose is different from the actual Event, which Event, however, is a probable and obvious consequence; and though not adopted as an End, is adopted by the choice of Means. As if a man, meaning to shoot A. from B., standing by him. *Patti enim Naturam immutat propositorum agentis ubi Rei Natura non sit suâpte criminosa.* And thus this subordinate Maxim is reconciled with those primary ones, *Actus non facit reum nisi Mens sit rea;* and, *Voluntas et propositorum distinguunt Maleficia.*

When a clear Act of Publication, generally, is proved,
how this shall affect with Responsibility; and whom.

" his general intention, whether immediately and sepa-
" rately in his view or not.

" Practically, indeed, there can hardly be any
" Evidence of printing, as in itself an Act of Publica-
" tion, though it may corroborate other Proof. The
" just and necessary Exemption from Seizure of Papers
" renders the Abuse of this Species of Evidence im-
" probable to take place in future.

" If it should ever be offered, unconnected with other
" circumstances, on the mere testimony of a person
" declaring himself employed to transcribe or print, it
" would be, though *admissible*, very weak and *suspi-*
" *cious Evidence*, and upon which singly, without cor-
" robating Facts, no Jury, it may be presumed,
" would or ought to convict.

Par. 3.

Where Publication may not be criminal.

" After a clear Act of Publication, generally, the
" Question arises not unfrequently, whether the Facts
" in Evidence render the party charged, criminally liable
" as Publisher.

1. *From the involuntary and justly excusable Ignorance of
the Party as to the Fact of publishing.*

" This generally happens where the Prosecution is
" against a *Master Printer*, an *Editor* of a *Newspaper*, or a *Bookseller*. And the Evidence com-
" monly attempted to be introduced is, that they
" knew not of the *libellous Article*; that they never
" saw or heard it: that they were absent in the Coun-
" try at the time of its being sent, printed, and pub-
" lished;

Master Printer, Bookseller, &c. answerable.

" lished; or that they were under Restraint; and sometimes the Maxim is intimated or expressed, that a Master is civilly, but not criminally, responsible for the *Act* of his Servants.

" The true Rule, which will govern the *Admissibility*, the *Application*, and the *Effect* of these and similar points, when given, or offered to be given, in *Evidence*, has been more than once judicially expressed. It results from the Nature of the Subject. In the Case of general Service a Master shall answer civilly for the *Act* of his Servant, though wholly unconnected with the service: because it is presumed that he has Authority to restrain those who are in his service from *Acts of Malice or Negligence* injurious to the property of others; and frequently the compensation can be sought no where else: but as this Remedy is derived from a Principle which does not suppose Command or Privity in the Master, it is confined to *Satisfaction for Damage* suffered, and extendeth not to *Punishment* for a Wrong committed.

" But PRINTING is a special *Employment*: the Workmen, by whose hands it is to be executed, are not merely servants to perform the general Business of their Master, but to execute that special determinate Employ: and the *Master Printer* is a voluntary public *Agent* to receive and convey Intelligence to the Public. The servants are the *hands*, or, as it were, the instruments by which he performs this. They print what they receive by Authority from

" him,
" both I."

" him, either immediate or through the intervention
" of others; either express in the particular, or im-
plied in a general permission or acquiescence. And
the Rule is just and clear, that an express Command
to do an illicit Act needs not to be proved, when it
is suffered to be done by those who had the means
and obligation of knowing, and the power to have pre-
vented it."

" The Privity and Consent of the Master is there-
fore *prima facie* of Necessity presumed. General
Allegation of Ignorance is consequently *not admis-*
sible Evidence in his favour: but he may repel the
Presumption by proof of *particular Facts*. In the
mean time, as on him depends what is to be re-
ceived or rejected, and with him is the active Autho-
rity and the Controul, *all is to be presumed to have*
been done by his direction which he does not prove to
have been done contrary to it, or in fraud of it, or by
mistake.

R. v. Almon.
M. 11 G. III.
V. Burr.
Manuf. 2622.

" If in this and the former page a Repetition
should be noticed by any who may happen to have
read the Essay lately mentioned, it will perhaps be
excused; the sentiments remaining the same, and
other terms not always occurring by which they
might be expressed.

* *Qui non vetat quum debeat et possit, jubet.*

Exculpatory Facts to repel this Presumption.

" Particular exculpatory Facts, which may be given in Evidence to exempt from the Charge of being Publisher of a Libel, are these:

" That he refused it when offered; that it was clandestinely sold against his positive orders:

" That by reason of sickness, as in the delirium of a Fever, he was disqualified from inspecting the Press or regulating the sale in his shop: Absence under circumstances not importing fraud or neglect; in which case a temporary Manager stands, during the interval, in the same responsibility as the Master.

R. v. Woodfall.

" Imprisonment is *prima facie exculpatory* Evidence: but if Access of Servants to the Prison be proved, and Liberty of transmitting Copies, Proof-sheets, &c. the Exculpation then ceases.

" And any degree of *Laches*, as in all criminal Cases, incurs a Responsibility.

R. v. Williams.
M. 14 G. III.

" And therefore that a News-paper, containing a Libel, was printed and published before he rose in the Morning, and that he afterwards stopped the sale of it, is not Evidence sufficient to *acquit*, though after Verdict it is proper in mitigation of the sentence.

Salmon's Case.
Hil. 1717.

" Where a Linen-draper allowed his son, being a Printer, to use part of his shop to keep Pamphlets for sale; in the absence of the son a Pamphlet was called for, and the Father ordered his Niece to look it out and give it: the Publication being deemed libellous, the Court granted an Information against the

" the son, but not against the old man, who, being,
" so far as then appeared to the Court, no way con-
" cerned in the trade, his ignorance of the Nature
" of the Pamphlet was considered as a fair excuse suf-
" ficient to exempt him from the information.

" Evidence of a Bookseller's Name in the Title-page
" is not Evidence in itself to charge him as Publisher,
" without its being sold at his shop, or any other A&T
" of Publication. It is said to be a common Practice
" among Booksellers to affix the Name of a Man of
" Eminence in the Business without consulting him:
" and even were it otherwise, it is evidently in itself a
" circumstance which may take place without the pre-
" vious consent, or even subsequent knowledge, of the
" party whose name is thus used.

V. Burr. 2686.

2. *From the allowable Cause of the Publication.*

" Publication, on which a Defendant may be con-
" victed, must always include *Malice*, either *express*
" or *implied*. When therefore the Facts in Evidence
" exclude such Implication, a Defendant is not legally
" liable to be convicted as *Publisher*. This may be
" illustrated by a Case where the supposed Libel was
" against a private individual.

" It came before the Court on a Motion for a new
" Trial. The Prosecutrix in the Name of the Crown,
" was a Quaker. Being thought less circumspect in
" her behaviour than the Principles and Rules of that
" Society required, she was first admonished for fre-
" quenting Balls and Concerts; Deputies were next
" sent to her; and, finally, she was expelled: and
" the

R. v. Hart.
Bl. R. 386.
M. 3 G. III.

No Matter can be libellous where Malice, either express
or implied, existeth not.

" the Reason was entered on their Books—for not
" practising the Duty of Self-denial. This was signed
" by the Defendant as Clerk to the Society. The
" Prosecutrix sent her Maid for a Copy of the Entry,
" which was delivered to her by the Defendant, and
" was the only Act of Publication in Evidence. She
" moved an *Information*, which was denied: where-
" upon she preferred an *Indictment*, which was found
" at Nottingham Sessions, removed by *certiorari*, and
" tried at the Assizes for that County before Mr. Justice
" Clive, who left it to the Jury, and they found the
" Defendant guilty. It was argued to be irregular to
" leave it to the Jury at all upon *such* Evidence only of
" Publication, as Delivery of a Libel by Mistake
" will not be *Publication* of it when another Paper,
" not libellous, was intended to have been delivered,
" because there is no libellous intention: so here the
" Delivery of a Resolution of the Society, of which
" the Prosecutrix had been a Member, at the Request
" of herself.

" The Judge declared himself dissatisfied with the
" Verdict: and the whole Transaction appearing to
" the Court as merely a piece of *Discipline*, they, for
" that reason, granted a new Trial without any Rule
" to shew Cause.

TITLE IV.

*The constitutional Grounds which seem to support the Rule,
that a Man cannot justify on an Indictment for a Libel.*

" We have seen that a man cannot give the Truth
" of a *private Libel* in Evidence on an *Indictment* or
" *Information*. We have seen that for this Rule, as
" applied to *private Libels*, a very satisfactory Reason

" has

"has been given: but it is applied also to *Libels*
"against the Government: and for such application,
"it has sometimes been insinuated, the same Reason
"would sufficiently account.

"But the Justification of this Rule, in respect of
"a Charge of public Libel, seems to depend on a
"Reason as different as the Nature of the Subject
"differs.

"In a free Government, Transactions which con-
cern the Public are, and ought to be, Matters of
public Notoriety. Animadversions on them, if
not thrown wantonly and at random, must correspond
with known Facts and with clear Principles of the
Constitution. The Jury has a Right to decide on
the whole Matter. But, as was said before of an
higher exercise of popular Right,* it may here be
observed of this, that the true and only proper
Defence, on such an occasion, is not of a Nature
to call for Proof by Witnesses. The time, the cir-
cumstances, the facts to which the Publication re-
fers, the scope to which it is pointed, all speak for
themselves; all, under the general Issue, are pro-
perly before the Jury. The Truth to be proved,
where Publications concerning Government come in
question, is generally a *moral* Truth: not whether
the Facts exist (for if these remain to be proved,
they ought not to have been asserted); but whether
on Facts of public Notoriety the Principles and
Inferences are justly applied. Now this can never
be a Matter of Testimony: but is directly and ab-
solutely to the Knowledge and Conscience of the JURY.

* *V. supra,*
vol. 2.

*Regina v. Full-
ler.* 1 A. 1702.
IV. St. T. 573.
V. supra, 237.

" FULLER's Case, where Lord HOLT would have
 " permitted one to prove the Truth of his Allegations
 " by Witness, had he been able; has indeed been
 " offered as an Authority that the falsehood of a
 " PUBLIC LIBEL, as to Fact, is essential to the cri-
 " minality of it, and the *Truth* of it may be proved
 " by Witnesses. But that seems to have been a Case
 " of *Scandalum Magnum* on the Statute against
 " spreading *false* News to the Slander of great Men:
 " and in that instance it seems necessary to charge the
 " *Falsitudo*. But in Indictments for seditious *Libels*,
 " FALSE, in the only sense in which it seems necessa-
 " rily applicable, is, for the reasons given, included in
 " *malicious*; and the word *false* is not unfrequently
 " omitted in such Indictments.

" We have seen that a Conviction for a LIBEL does
 " not, like *Peyjary* or *Forgery*, offences which come
 " within the strict legal Idea of the *Crimen falsi*, inca-
 " pacitate from *Testimony*; because such Writings do
 " not necessarily affect the Veracity and general Credi-
 " bility of the Author. A Conviction on a Charge of
 " this general and delicate Nature, which, according
 " to times and seasons, may be the reward of Com-
 " positions of very different Character and Tendency,
 " not being thought a Ground of ranking the party
 " who labours under it with persons incapacitated by
 " the Judgement of their Peers for Crimes proceed-
 " ing from the wilful *Abandonment* of *Truth*.

TITLE V.

Requisites on the Charge to which the Evidence must apply.

“ Evidence on a *Libel*, as in every other instance,
“ must apply to a Charge sufficiently apparent on the
“ Record: by way of *Recital*, if it be introductory
“ Matter of general Notoriety, in reference to which
“ the expressions used are criminal: by way of *Aver-*
“ *ment*, if a particular Fact is to be previously esta-
“ blished, in application to which consists the *cri-*
“ *mality*, so as to authorise the subsequent *innuendos*,
“ by which the particular import and criminal appli-
“ cation of the Words is explained, in conformity to
“ such particular Fact precently averred.

V. R. v. Rose
well.
IV. St. Tr.
1001, 2. 1045, 6.
1049, 50.
1052. 1054, 5.

“ In the Case cited not many pages back, the *Aver-*
“ *ment* was, that he maliciously, advisedly, and traiterously published a false and traitorous *Libel*, intititled, *Ex ore tuo te judico, Vox Populi Vox Dei*, of and concerning the Person, in the Life of the late King James the Second, pretending to be Prince of Wales, and since his Decease pretending and taking upon himself the style and title of King of England.

“ And without this *Averment* the *Innuendo*, explaining the *Chevalier* to mean the Pretender, had been vague, foreign, and vain.

Regina v.
Tutchin.
IV St. Tr. 66o.

" There was a similar Averment in Tutchin's Case,
" that he published a LIBEL of and concerning the
" Royal Navy of this Kingdom and the Government of the
" said Navy.

R. v. Horne.
M. 18 G. III.
1777, and
Dom. Proc.
21 May, 1788.
Copp. 672—
39.

" In the last Case which received the Opinion of
" all the Judges, on Error, in PARLIAMENT, the
" Reason and the Extent of this Rule is fully illus-
" trated.

Copp. 672.

" There the Averment was, that the Paper in ques-
" tion was published of and concerning his Majesty's
" Government, and the Employment of his Troops: with
" an Introduction, charging this to have been done
" with an intent to cause it to be believed that divers
" of his Majesty's innocent and deserving subjects had
" been inhumanly murdered by his said Majesty's
" Troops in the Province, Colony, or Plantation of
" Massachusetts Bay, in New England, in AMERICA.

IV St. Tr.
Sacheverell's
Case, 775, 6.
and 935, et
passim.

" In the Case of Sacheverell, who was impeached for
" Sermons preached, and afterward published by him,
" by which he is charged to have suggested and main-
" tained that the necessary means of effecting THE REVO-
" LUTION were odious and unjustifiable,—the introductory
" Article recites the REVOLUTION, though an Event
" of the greatest, most splendid, and then recent
" Notoriety: but it recites it because the Assertions
" imputed to the Defendant were not criminated as
" general Propositions concerning the Duty of Obe-
" dience and the Unlawfulness of Resistance, but as
" particularly applied to the Revolution, by asserting
" that to impute Resistance as the means of effecting
" the

“ the Revolution was to cast black and odious Colours
“ upon it. Now it being notorious that the Revolu-
“ tion was effected by a national Act of Resistance,
“ these expressions were charged as equivalent to af-
“ fering that the true Colours of that Event were
“ black and odious. And therefore the *means* by
“ which the *Revolution* was effected are recited in the
“ Introduction, that it might appear upon the Face of
“ the Charge in what respect those Assertions imputed
“ to the Defendant were criminated.

“ The Case of the *Dean of St. ASAPH* went upon
“ the want of an *Averment*, which should have pointed
“ the Application of the Dialogue there charged as
“ *libellous*, and shewn with *what particular reference*
“ the abstract Propositions contained in it, concerning
“ the Necessity that the People should learn the Use
“ of Arms, and their Right to defend themselves
“ against Mal-government were criminated as a *Libel*.

R. v. W. D.
Shipley, cl.
Apr. 1783.

“ That Indictment set forth the Dialogue, and
“ averred it to be *of and concerning the King and the*
“ *Government of the Realm*. But it did not refer the
“ Application of it to any particular Case or supposed
“ circumstances.

“ Where the Criminality is express and ascertained
“ on the Face of the Publication, there needs in such
“ Case no accompanying *Recital, Averment, or Innuendo*.
“ But this only can happen where the *Libel* is direct
“ and express, and both its criminal meaning and its
“ particular object stand clear and unambiguous upon

Cowp. 683.

The Matter charged as libellous must appear on the Record.

“ the Face of it, and the Crime is complete independent of other circumstances.

T I T L E VI.

The Matter charged as libellous must appear on the Record, either according to the Tenor or the Purport.

P. VI H. St.
Tr. 77 and
33.
xi. 324.

“ Where a LIBEL is charged, the *Corpus Delicti*,
“ the Matter charged as libellous, must appear on the
“ Record: either the *Tenor* must be averred, and then
“ the Words charged must be proved *verbatim et liter-
ratim*, most precisely as laid; or the *purport* and
“ *effect*, and then proof of such criminal expressions
“ as charged must be made *substantially*, though not
“ *literally*. But the whole Publication, in which the
“ supposed libellous Matter charged is contained, needs
“ not to be set forth: only they can prove no libellous
“ matter of a purport and effect specifically different
“ from that which they have charged. But they may
“ give in Evidence *other parts*, supporting and corro-
“ borating the importance of those which they have
“ expressly laid; and the *Defendant* may give in Evi-
“ dence *other parts*, or the whole, in explanation.

“ Thus the Charge, the Allegation, and the Proofs
“ to support it, are fixed and determinate: and thus
“ it is necessary; for the security of the individual and
“ the common Freedom. Nothing would be more
“ destructive than if a *vague* Charge were permitted
“ to attach itself to such *floating Facts* as might rise in
“ a vast Sea of Evidence. It is necessary that the

“ De-

" Defendant know to what general Point he is called to answer, that he may not be unprovided of his just Defence; it is necessary that the Jury should have one definite object to which with undistracted attention they may apply the Evidence, and that according to the Facts found, there should exist upon the Record a clear and permanent Reason for the necessary legal Conclusion, which may not only ascertain and limit the Principles of the Decision in the particular instance, but remain as a Beacon to Posterity. And in this Certainty, which forbids any sentence to proceed but on *Proof* correspondent to just, *general*, and settled Rules, on a Charge distinctly *set forth*, and accordant to the Quality of the Case as by Law declared, consisteth the Distinction between a Government of *Laws* and a Government of *arbitrary Will*.

" There has indeed been one *Exception* admitted to this Rule that *the libellous Matter must appear on the Record*: but this relates to a particular Course of Proceedings: of which some mention must hereafter be made.

CHAPTER XII.

Of EVIDENCE as it relates to ACCESSORIES or ACCOMPLICES, and therein of the Distinction of PRINCIPALS in the second Degree.

" We have considered the Evidence applicable to
 " most of the principal Misdemeanours and capital
 " Offences, with respect to those by whom they are
 " actually committed. The Order of the Subject na-
 " turally now suggests the Consideration of *Accessories*
 " or *Accomplices*.

" An *Accessory* is properly one whose *criminal Charge*
 " is considered as subordinate and secondary to that of
 " the *Perpetrator* of the Crime.

" He is either *accessary before or after the Fact*.

" *Before the Fact*, by procuring, advising, or con-
 " tributing to the means of its being committed ;

" *After*, by harbouring or assisting the Criminal to
 " escape, knowing him to be such ; or by other similar
 " Acts.

" In the extremes of offences, alike the least and the
 " greatest, the Law excludes the Consideration of *Ac-*
cessaries, and regards all as *Principals* ; the shades of
 " Difference being regarded evanescent in *Trespass* from
 " the minuteness of the object, and in *TRAISON*, (in-
 " dependent of the Magnitude of the Crime in any
 " of its Degrees, which might be supposed not to be
 " sensibly varied by these nicer Discriminations,) the
 " purpose, with an *overt Act* towards the execution of
 " it, constituting, as we have seen, the complete of-
 " fence,

" fence, this purpose equally extendeth to all persons Comm. IV.
" who contribute their Advice or Assistance to the Ch. 3. p. 35.
" Design.

S E C T I O N II.

Of Accessories before the Fact.

" In *Manslaughter* there can be no Accessory before Comm. IV
" the Fact; because that implieth premeditation,
" which constitutes the specific difference between
" *Manslaughter* and *Murder*.

" An Accessory before the Fact could not at Common IV Comm. 323,
" Law be put to his Trial, (unless he waived the ex- 4
" emption,) until the Principal were attainted: and
" therefore whatever of the many circumstances took
" place by which the Attainder of the Principal could
" be intercepted, prevented by consequence the Trial
" of the Accessory: but this is remedied by Statute. 3 A. c. 9.

T I T L E II.

How far a Party charged as Accessory may controvert the Guilt of the supposed Principal.

" It is of importance to ascertain how far the Accessory may call in question the Attainder of the supposed Principal.

" The solution of this point is not a little dependent on the Nature and general Rules of Evidence.

" On the Trial of the supposed Principal, the person, who, after his Conviction, and the sentence which attaints him, becomes chargeable as Accessory, was no party to the Process.

" He could take no advantage then of objections either to the Evidence of Fact, or to the Conclusion

*How far a Party charged as Accessary may controvert
the Guilt of his supposed Principal.*

" of Law deduced from it: of course no neglect,
" error, or misconduct, on the former Trial, shall
" prejudice him, from controverting either the *legal*
" *Quality of the Facts*, or the *relevancy* of the Facts
" proved to the Charge on which he was indicted.

Fob. 222, Sec.
344, 5.

" Such was the Case of *Macdaniel and others*: where
" the offence of the *Principal* not amounting to *Rob-*
" *bery*, because the party supposed to have been *robbed*
" was guilty of a concerted scheme of villainy by pro-
" curing himself to be thus assaulted, and goods
" taken from him, in order to obtain the reward under
" the Act of Parliament for apprehending highway-
" men, the *Accessaries*, by procuring this supposed
" Robbery to be committed, were necessarily dis-
" charged of the *Felony*, and could only be convicted
" of an high *Misdemeanour*; though the Principals in
" the supposed Robbery, *Ellis and Kelly*, being igno-
" rant of the *Conspiracy*, could take no advantage of
" it, and were consequently convicted: as *Kidden*, by
" the procurement of *Macdaniel*, with others of these
" Wretches, was convicted and executed for another
" supposed *Robbery*.

V. supra.

4 & 5 P. & M.
C. 4.
2 & 3 W. & M.
c. 9.

" The Indictment, in that Case, being on the Sta-
" tutes against such as shall *maliciously counsel, bire, or*
" *command, comfort, aid, abet, or assist*, it was con-
" tended that there must be a personal, immediate
" communication from the supposed *Accessaries* to the
" *Principals*; otherwise there could be no Accessary.

" On that Verdict it was found, that the persons
" who actually committed the supposed *Robbery*, had

" no

" no conversation previous to the Fact with the persons charged as *Accessaries*: and that the immediate procurer had led them on under the pretence of another design: but it was agreed by the Judges, that the Prisoners could not avail themselves of this circumstance, it being part of the original agreement to which they were privy: and that had, in point of Law, a Robbery been committed, the Facts found were sufficient to have charged them as *Accessaries*.

Fob. 225.

" That at Common Law, if A. order his servant to hire some one to murther B. and the servant, according to this general command, procure a person who perpetrates the *Murther*, it is utterly immaterial whether the Murtherer so hired was seen by A. previous to the Fact, or ever had any conference with A. or received from him personally any instructions, or knew that A. was his employer. If the hiring for this atrocious purpose be traced to A. he is, on such proof, an *Accessary before the Fact*.

" And that the Words of the Statutes, in this particular instance, are sufficiently comprehensive to include those who at Common Law would have been comprised as *Accessaries before the Fact*, by procuring a Felony; without immediate communication with the person by whom it was committed.

II Inst. 182.
on 1 Westm.
c. 24.
3 E. I. Ann
1275.

TITLE III.

Party procuring is Principal where the immediate Actor is innocent.

" As there can be no criminal Accessary to an innocent Act, if a man procure the death of another by the instrumentality of an *infant*, who has not attained

1 H. H. P.C.
514, 617.
Fob. 349.

Where the immediate Actor is innocent, the Party procuring is Principal.

" tainted discernment of good and evil, an *idiot*, or a "*lunatic*, he cannot be indicted as *Accessary*; but "*though absent when the stroke was given, may be tried and convicted as Principal.*

*Fob. ibid.
Ked. 32, 3.*

" So if *Poison*, under pretence of Medicine, be "*given by A. to B. unknowing of the murtherous intention, to be delivered to C. B. innocently delivereth it; C. taketh it and dieth: A. is Principal in the Murther; though absent.*

" If *A. procure B. to prepare Poison to kill C.* who "*accordingly doth prepare it, and causeth it to be delivered to C. who taking it dieth; B. in this Case, by mingling the Poison is Principal (the Deliverer of it to C. not knowing its deadly Quality) and A. is Accessary before the Fact: but if A. had assisted in mingling the Poison, then A. also had been Principal with B; for both had contributed their equal share to the Act which, under these circumstances, constitutes a Principal.*

TITLE IV.

Accessary where the Fact is substantially the same, notwithstanding Variance in Circumstances.

" A Man may be *Accessary before the Fact* where "*substantially the Felony committed is the same with that which he advised or commanded. As if A. advise B. to shoot C. and B. poisoneth C. whereof he dieth, instead of shooting him; A. is accessary to this Murther: for it is the same Felony which he advised B. to commit: and he shall never be allowed to discharge himself by proving the felonious intent to have been executed by means different from those which he suggested.*

" Again,

TITLE V.

" Again, a Man shall be answerable as Accessary,
" if the Fact in Evidence against him be a probable con-
" sequence of the felonious or unlawful Act ordered or ad-
" vised: as if A. being affronted by B. ordereth C. to
" lay in wait for B. and to give him a sound beating:
" C. doth so, and B. dieth of the beating, A. is held
" accessary to this Murther: for in such case, where
" death was a consequence probably to be apprehended, the Law will not allow him to limit or ap-
" portion his own Wrong.

" And on this Principle, it seemeth that if A. order
" B. to shoot C., and B. by missing his aim, shooteth D.
" standing nigh to C., A. is accessary to the Murther.
" What is suggested to the contrary by two great
" Writers appears not to counterbalance the plain Ana-
" logy of the Rule, and the clear Reasons of the Au-
" thor of the *Discourses on the Crown Law*.

H. H. P. C.
617.
III Inst. 51.

TITLE VI.

Not where the Felony is both actually and intentionally
different.

" It is different where the Evidence is, that one ad-
" viseth a Murther to be committed, and the party
" by whom it is to be perpetrated knowingly com-
" mitteth another; for a Man shall not be charged as
" Accessary beyond the Crime which he intended to pro-
" cure or encourage, or Events of a like kind natu-
" rally connected with it: and on this was grounded
" the Distinction in the Case of *Saunders*.

Plowd. 473.

" He, intending the Murther of his Wife, gave her,
" by the Advice of one *Archer*, a poisoned Apple: of
" which, after eating a small part, she gave the re-
" mainder to their Child; *Saunders*, rather than suffer
" the detection of his guilt, after a faint effort to

* *Regina v.*
Saunders, and
v. Archer.
Hil. 13 Eliz.

" pre-

Person not chargeable as Accessary by criminal Advice or Command where the Felony committed is both actually and intentionally different.

" prevent the Calamity impending over his Child from taking place, permitted it to take the poison, of which it died. It was ruled, without much difficulty, that *Saunders* was guilty of this *Murder*: but, with regard to *Archer*, the Judges on Conference held that he was not chargeable as *Accessary*: for the offence committed was entirely distinct from that count seduced by him; and not done in pursuance of the Felony advised, but by an Act and Occasion independent of it.

This. 475 b.

" And the Distinction is approved by that eminently judicious and learned Reporter; who gives instances to illustrate the diversity. As where a *Robbery* is commanded;—the person to be robbed defending himself is *murthered*: this shall render the Adviser of the Robbery *accessary* to the *Murder*; for it was a probable and naturally connected consequence of the Command or Advice given: or if one is persuaded to burn the House of another, and the fire catches an house contiguous, the Procurer of the first felonious Act shall also answer as *Accessary* for the burning of the contiguous House: but if one be directed to set on fire the House of *A.* which he well knoweth, and he wilfully burneth the House of *B.* this shall not charge the person who gave such original command as *Accessary*; for it is neither pursuant to his direction nor consequent upon it.

TITLE VII.

Person indicted as Accessary to several, Evidence of his being Accessary to any proves the Indictment.

" Formerly a man could not, it was held, be indicted as *Accessary* in the same *Felony* to different persons till all had been attainted: but this point has been long settled otherwise on the clearest reason. And therefore a man may be indicted as *Accessary* to such as

" are

" are attainted, and if proved to be Accessary to any
" of them, this will be Evidence sufficient to convict :
" on the other hand, if acquitted as to those, he may
" still be indicted as Accessary to such as shall after
" have been attainted.

F. Cr. L.
360, 2.
2 Inst. 183.
9 Rep. 119.
H. H. P. C.
265.

TITLE VIII.

In the Eye of the Law the Offence of Principal and that
of Accessory before the Fact specifically differ.

" And the Felony of the Principal being, in legal
" Consideration, a distinct offence of a different and
" specific Nature from that of the Accessary," if two
Persons are indicted as Principals, and the Evidence
proves one Accessary, he must be discharged on the
Indictment: because he is not proved to have done the
Fact, which is the Crime laid in the Indictment, but
to have abetted the doing of it; and "it is thought"
that they came to be distinguished when the intent of
the Murther was not allowed to be Murther, as it
formerly had been, unless the "Event" actually fol-
lowed; for anciently the intent to murther made the
"complete" Crime, "if manifested and pursued by
"some overt Act," as it doth "at" this day in
Treason, where, "for that cause," there can, "as we
"have seen," be no Accessaries.

v. supra, 854.

Corollaries.

1. Party acquitted as Accessory may be indicted as Principal.

" But, on account of this distinct Nature of the
" offence in a legal view, if A. be indicted as Prin-
" cipal, and B. as Accessary, and both be acquitted,
" B. may still be indicted as Principal.

2. And, by the better Opinion, e converso, the Party acquitted as Principal may be indicted as Accessary.

" On the other hand, it seems to have been held,
" without any sufficient reason, and indeed in re-

§ H. H. P. C.
66.
2 Hale, 234.
2 Hawk. 273.
Kel. 25, 6.
2 E. II.
Coron. 444.
cetera.

" pugnance to the Rule and its Principle, as last
" stated, that if *A.* be indicted as *Principal* and ac-
" quitted, he cannot after be indicted as *Accessary*
" before the Fact: for that it is in substance the same
" offence. It is the same in a moral view, but not
" before the criminal tribunal of a Country of which
" the Laws have made a discrimination so express:
" and as they specifically differ, as a person under an
" Indictment as *Principal* cannot be convicted on Evi-
" dence merely proving him to have been *Accessary*
" before the Fact;—as an *Accessary* acquitted may be
" still indicted as *Principal*;—the accumulative force
" of all these Rules, and the common Reason on
" which they are founded, seems decisively to autho-
" rize the sentiment of Sir Michael Foster, that one
" acquitted as *Principal* may be indicted as *Accessary*.

S E C T I O N III.

Of Accessaries after the Fact?

“ *Accessaries after the Fact*, by harbouring, supply-
“ ing, or assisting to escape, fall within the Rule of
“ *Accessaries before the Fact*. It must be proved
“ that they knew of the felonious Act, and that they
“ knowingly harboured, or gave other Assistance to
“ the person by whom it was committed.

T I T L E II:

The Principal must be first attainted on Record.

“ And therefore the Felony of the *Principal* must,
“ in this instance, even with greater reason than in
“ that of *Accessaries before the Fact*, appear *attainted*
“ upon Record: otherwise for the mere harbouring of
“ a person, afterwards found innocent by Judgement
“ of his Peers, another might be attainted. The
“ Proceedings, therefore, against the Lady *Lisle* have R. Cr. L. 346.
“ been justly reprobated in the strongest Terms, as not
“ less contrary to Law than to Humanity: for al-
“ though in strictness there can be no *Accessaries in*
“ *Treason*, yet, till the attainer of the supposed *Prin-*
“ *cipal*, all whose Guilt is *dependant* on that, are within
“ the just and equitable *Analogy* of the Rule concern-
“ ing common *Accessaries*: and accordingly in the
“ *Reversal of the Attainder of Lady Lisle*, one of the
“ Causes

3 W. & M. *

" Causes of Illegality recited is, that she was indicted
 " under an irregular and undue Prosecution for enter-
 " taining, concealing, and comforting John Hicks,
 " Clerk, a false Traitor, knowing him to be such,
 " though the said John Hicks was not, at the time of
 " the Trial of the said Alicia Lisle, attainted or con-
 " victed of any such Crime. *

IV Comm. 39.
 III Inst. 108.
 Bract. L. III:
 252 b.
 M. 37 E. III.
 a Hawk. 320.

Ibid. 38.

" A Wife cannot become Accessary by receiving and
 " concealing her Husband; for she is presumed,—be-
 " sides the reason, from the nearness and tenderness of
 " the relation,—to act under his coercion. But as Rea-
 " son and Humanity make a slow progress when ima-
 " gined Policy is opposed to them, this exemption is
 " extended to no other relation; not even of a Child
 " in filial anxiety for the Parent, nor of a Mother
 " under the Agony of Affection for her Child, nor of
 " the Husband thus protecting his Wife; but all
 " these are liable as Accessaries after the Fact.

3 & 4 W. & M.
 c. 9.
 2 A. sess. 2.
 c. 9.
 5 A. c. 31.
 Post. D. III.
 C. III. § 6.
 IV Comm.
 C. 10. § 9.

* Improperly omitted as a pri-
 vate Act, though it contains a
 Declaration of public Law of the
 first and most general Importance.

† Receiver of Stolen Goods,
 who is a Felon by Statute may be
 indicted for a Misdemeanour,
 though the Principal be not before
 convicted; or, as a subsequent
 Statute expresses it, cannot be
 TAKEN so as to be prosecuted
 and convicted.

Of

" It is obvious, from what hath been said, that the " Felony must be complete, and the Point which as-
 " certains it to be such must have taken place before
 " the harbouring and assisting of the offender can ren-
 " der any one an Accessary after the Fact: and there-
 " fore if one giveth a mortal wound to another, and
 " fleeth, the concealment of such offender before death IV Comm. 38.
 " happens in consequence of the wound will not ren-
 " der the party so concealing an Accessary; for at the
 " time of the harbouring of such delinquent, it was
 " contingent whether there would be any Felony.

" In the Trial of an Accessary it is not necessary to J. Cr. L. 365.
 " set forth the Detail of Evidence against the Prin-
 " cipal: it is sufficient to recite the Record of the
 " Conviction.

S E C T I O N IV.

PRINCIPALS in the first and second Degree, more par- ticularly considered.

" If divers persons set out on an unlawful purpose,
 " an Act done by any of them, in prosecution of such
 " purpose, is, in construction of Law, referred to the
 " whole party. Fot. 351.

" The Resolution to go and maintain by FORCE an
 " unlawful purpose against all opposers is the Ground
 " of this Rule: and such Resolution may be either
 " express or implied.

* *A estimatio prostriti deficit ex post facto nunquam crescit.*

V.L. T. Reg. 3.
p. 61—3.

" A general participation in an unlawful Act will
 " not include those as *Aiders* and *Abettors* who are pre-
 " sent where a Mischief is done not naturally con-
 " nected with the common object of their Enterprise.

" And on this depended the Determination in the
 " Case already cited: and also in another, where three
 " soldiers went to rob an orchard; two got on a pear
 " tree, and the third stood with a drawn sword in his
 " hand at the gate. The owner's son coming by col-
 " lared the man at the gate, who thereupon stabbed
 " him: it was ruled by *Holt* to be *Murder* in the man
 " who stood at the gate, but that those in the tree
 " were innocent. It would have been otherwise, said
 " he, if they had all come thither *with a general
 resolution against all opposers.*

" Perhaps some circumstance is omitted in this Case,
 " which might prove, on the Trial, that the third
 " man might go together with the others into the or-
 " chard, and might afterwards post himself as Cen-
 " tinel without their knowledge of his standing there
 " with a drawn sword: otherwise this circumstance in
 " itself seems to have been Evidence, till contradicted
 " by other proof, of *a general resolution of resistance*,
 " and fit as such to have been left to the Jury: and
 " one should think, to have been left rather strongly.

TITLE II.

" The Presence which shall render a person a Prin-
 " cipal in the second Degree as *present*, *aiding*, and
 " *abetting*, may be a constructive one: it does not
 " require to be actually within sight, or even imme-
 " diately within hearing; but to be of a party as-
 " sembled

V. supra.
 Plummer's
 Case, p. 773.
 Fort. 353.
 MSS.
 Denton and
 Chapple.

" sembled for an unlawful purpose with a general resolution to resist ; and so far to have continued in that party as to be ready to give assistance, if required ; " as in that celebrated Case, where the Lord Dacre and divers others came to steal deer in the park of a Mr. Pelham ; one of the company, Royden, killed the Keeper in the park, the Lord Dacre and the rest of the company being in other parts of the park ; it was ruled Murther in all.

Ld Dacre's
Case.
H.H.P.C. 439.
Moor, 86.

TITLE III.

In what Cases generally a Person present and encouraging shall be a Principal in the second Degree.

" It has been a point of some Nicety to determine where Evidence of being present and encouraging, or deliberately in readiness for assisting, shall render a person liable as a Principal in the second Degree, and what Charges it shall not so affect him.

" On the Statute of stabbing, persons aiding and abetting, though Principals in Manslaughter at Common Law, are admissible to their Clergy : the intent of the Statute appearing to have been to distinguish the person who actually gave the stab.

Foist. 355, 6.
R. v. Page and Harwood.
Al. 43.
St. 86.
IV Burr.
Mansf. 438.

" The Case of Robbery in Dwelling-houses, which would not have been Burglary at Common Law turns upon the wording of the Statute. A person who did not enter was not guilty of robbing in the House, and therefore was not ousted of his Clergy till a subsequent Statute.

Regina v.
Evans and Finch.
Cro. Car. 473.
3 & 4 W. & M.
c. 9.

" The Construction of the Statute against stealing privately from the person has not been extended to Aiders and Abetters ; for, saith Hale, this Statute shall be taken literally.

8 Eliz. c. 4.

9 G. L.

" There hath been diversity of opinion on that branch of the Black Act which relates to the killing of Cattle.

R. v. Simms
and Merryweather.
Gl. Aff. 2749.
cited IV Burr.
Mansf. 2075.

" Accordingly, where two men were indicted on that Act, the Evidence was that one, (*Simms*) held the *Mare*, while the other (*Merryweather*) ripped up her Belly. Both were indicted as Principals. The Case was deliberately considered by the twelve Judges. Eleven thought the man who held the *Mare* a Principal in the second Degree so as to be ousted of Clergy; *Foster* thought otherwise. Lord MANSFIELD, in considering the Doctrine of *Aiders* and *Abettors*, expresses a clear persuasion of the propriety of that determination which held *Simms* to be ousted of his Clergy.

R. v. Royce.
IV Burr.
Mansf. 2076, 7.

" In Murther, *Burglary*, *Robbery*, and certain odious Acts of personal Violence, those who are present, *aiding*, and *abetting*, have always been considered as ousted of their Clergy. In *Riot*, perhaps, the very Nature of the Offence suggests a Reason additional to those of the other Cases for considering *Aiders and Abettors*, without actual force, as Principals.

" Perhaps the true general Rule is, that where the Terms of the Statute or the Nature of the Subject do not limit the Construction, or furnish strong reasons for restricting it to the person who did the Act, persons present, *aiding*, and *abetting*, are included in the extent of the penal Law, though not expressly named: because such are Principals in the second Degree by the general Rules of Interpretation.

" But

" But as the Jury must find *Facts*, from which the Conclusion of Law directly resulteth, and not merely the Evidence of such Facts: if there be no force, and they find a person present, and find special Acts done by such person, which would have warranted a finding that he aided and abetted, still if they do not find in terms equivalent (for no technical ones are required) that he did give his assistance and encouragement, he cannot be liable as an *Abettor*.

Kel. 79.
v. *supra*.
Royce's Cafe.

" In *Purcas's Case*, which was reserved † for this head, the Jury found he was not present at the original assembling to destroy the Meeting-houses, but that he came up when they were burning the Materials of one of the said Houses, and with his sword drawn defended the Mob so employed, and encouraged the destruction of the Materials, and attacked the Queen's Guards; *Trevor, Powel, and Price* thought that upon this finding he was not guilty of *Higb Treason*: but all the other Judges, of whom was Sir *Thomas Parker*, Chief Justice, thought otherwise: as he was found to have used actual force in defence of persons then in the Act of Rebellion.

Regina v. Purcas.
H. St. Tr. VIII.
267—90—
† *vi. p. 793.*

TITLE IV.

FACTS, material or immaterial, to be charged and proved on INDICTMENTS.

" We pursued the leading Points, Circumstances, and Conditions of Evidence through the principal Cases of Misdemeanour and capital Offence.

“ It remains, before we conclude this THIRD Book,
“ to subjoin some general Rules concerning *Indictments*
“ and the *Evidence* upon them.

Par. 2.

The Time immaterial.

² Hawk. P. C.
435 § 32.
H.H.P. 361.
² H. H. P. C.
279, 291.
Inst. 283.
II Inst. 318.
III Inst. 230.
IV St. Tr. 9.
H.H.P.C. 264.
Kel. 16.
Saik. 288.
Fott. 7--9.
R. v. Townly.

If the Indictment be of Felony at one day, and the Evidence be of Felony at another day, “ so it be prior to the finding of the Bill,” yet the Jury may find generally against the Prisoner: for the Question is not *when* the Fact was done, but whether it was done or not; and the Jury sworn *ad veritatem dicendam* must find the Fact, which, whensoever it was done, deserves the same Punishment.

H. H. P. C.
361.
² H. H. P. C.
179.
III Inst. 230.

But if the Jury give a *general* Verdict, where the Felony is proved at another day than that laid in the Indictment, there the party “ concerned in Interest by the relation of the Forfeiture” may falsify: for so far as any Record is inconclusive and undeterminate, so far you may falsify: for thereby you do not falsify the Determinations of the Law, which in all Law ought to be sacred and inviolable.

Now if a Felony is alleged at such a day and found to be done, it doth not follow that it was done at the day; “ for whether it were or not,” the Verdict and Determination of Law ought to be perfectly the same:

so that the *time* when the Felony was done is not determined and adjusted; nor, as to that, the Record is conclusive: and so far a Man is at liberty to make his Proofs; because the right owner thereby preserves his Property, and doth not invalidate the determination of Law, for what now comes into Proof was before undetermined.

But if the *time* when the Fact was committed were found by the Jury, all parties are concluded, and the Forfeiture must relate thither.

Par. 3.

If the Indictment lays the Felony at one Place, and the Evidence proves the Fact done at another Place *in the same County*, this will maintain the Indictment: for all criminal Matters were anciently tried in their proper *Leet*, as all local Actions were in their *County Courts*: but transitory Actions, where Time or Place is not material to the Essence of the Contract or Injury, are triable any where.

2 H. H. P. C.
180, 291.
Hawk. P. C.
264.
Salk. 238.

The party "within the Leet" had Goods whereby he might be summoned: now all Commissions, *Oyer et Terminer*, are made after the Policy of the old Law, according to the ancient Jurisdiction of the *Leet*: and therefore cannot try any thing where the Fact

arises out of the County ("Vide the Book of Courts") but may try all Facts within the same County: for the Place, "if only within these Limits," is but an immaterial circumstance.

"If a Person be mortally wounded in one County, and die in another, he who gave the Wound may be tried in the County where the party died.

3 & 4 E. VI.
c. 24.

"But the Place may be in another respect material, as will hereafter be shewn."

Par. 4.

Instruments immaterial provided the specific Act be the same.

2 H. H. P. C.
285, 291.
9 Rep. 67. b.
2 Inst. 319.
H. H. P. C.
265.
3 Inst. 50, 735.
2 Hawk. 437.
§ 37.

As Time and Place are immaterial circumstances, so are also the Instruments wherewith the Felony is committed; and therefore if the Indictment be for killing with one sort of Poison, and the Evidence prove a killing with another, such Evidence maintains the Indictment: because the Proof of the Instrument wherewith the Fact is done is not absolutely necessary to the Proof of the Fact itself.

2 Inst. 319.
3 Inst. 50.
9 Rep. 67.
H. H. P. C.
285, 291.
H. H. P. C. 265.
2 Hawk. 437.
§ 37.

But if a Man be indicted of poisoning, and the Proof be of stabbing, this Evidence doth not maintain the Indictment: because this is a Proof of a distinct

Ubi Natura Rei distinguit et nos distingueremus.

Fact and a distinct sort of Death: for the Death that arises from outward violence cannot be intended the same with that which arises from an inward application: now the Death proved and the Death alledged must be "such that" it may appear they "have" not proved different from what was alledged. Facts also differ where the Actions differ: as the Act of administering Poison and the Act of stabbing are plainly distinct Actions in the Actor; "nor could the Evidence which is to repel the Charge of one be applied to repel the Charge of the other:" but the Act of administering *Poison* is the same: "the general Evidence to disprove it is the same" whether the Party give *Henbane* or *Arsenic*: "and it would be most dangerous if the precise Allegation and Proof of the particular Poison which caused the Death were absolutely necessary :" so the Act of striking is the same, whether with a staff or with a dagger; and so these are not distinct Facts.

Par. 5.

Who actually gave the Stroke immaterial.

Indictment that *A.* gave the mortal Blow, and that *B. C.* and *D.* were *present and abetting*; and the Evidence is, that *B.* gave the mortal Blow, and that *A. C.* and *D.*

C. and *D.* were present and abetting: this maintains the Indictment. For when all are present they are all *Muribers* as if they had actually struck; all are reckoned to have struck; and he that gave the Blow is but the Instrument of the rest.*

T I T L E V.

*Where the generic Fact admits of Degrees of Criminality,
the Aggravations are not essential to the Indictment.*

"Thus on" Indictment of *Murder*, if it be proved
V. supra, 746. that words arose, "and that upon" Provocation "a
"sudden Combat ensued, and one, without any cir-
"cumstances of previous deliberate Malice, slew the
"other," here is Proof of the "generic" Fact,
"Homicide," without any of the circumstances of
Malice alledged in the Indictment: and so the Jury
may find him guilty of *Manslaugbter* (which is, "ge-
"nerally, under the Idea of unjustifiable Homicide"
alledged in the Indictment, "though not specifically
"charged") without the Aggravation of Malice,
which makes it *Murder*.

¶ J. I. c. 8.

"And" if a Man be indicted on the Statute of
stabbing, and the Evidence is that the "deceased"
person struck first, whereby he is out of the Statute,

*Pro Roscio
Amerino. § 34.*

* The Language of the Law of *England*, in this instance, is that of the *Roman* Orator—*Quo-* *niam enjus consilio occisus fit inve-
nio, cujus manu fit percussus non
laloro.*

yet

Where the Statute only varies the Evidence, it is not necessary to conclude contra Formam Statuti.

875

yet this will maintain a general Indictment for " Homicide, and fall under the Denomination of" *Manslaughter*. for this is an Indictment at *Common Law* as well as by the Statute: and " the Statute, as we have seen, has not created a new substantive offence, but varied the effect of Evidence in the specified circumstances :" and " therefore," though the Prisoner proves himself out of the Statute, yet he is not out of the Charge of the Indictment.

" And in like manner, in the Case mentioned before of a Woman indicted for the *Murther* of her *illegitimate Child*," if a Woman was indicted for killing her Bastard Child, formerly the Evidence ought to have been, " as in other Cases of Murther," that she had actually killed it: " either by direct Proof, or by circumstances indicating that it was born alive, and strongly throwing on her the Guilt of its Death : and such circumstances were to be left to the Jury, who would consider whether they were of force to overbalance the natural presumption from maternal Affection :" for that the Child is " not living" is " in itself" no positive Evidence that the Mother killed it; " nor, as we have shewn, and is obvious, does Concealment, under such circumstances, add much force to the Proof, if otherwise inadequate when weighed

22 J. I. c. 27.

" weighed with the atrocious Nature, and therefore proportionable improbability, of the supposed offence;" for in Matters of Life they required such Evidence of the Fact being committed, that the contrary could not "reasonably" be supposed. Now in this Case the Child might have been still-born; but because Mothers, to cover their shame, used to kill their Bastard Children ("a strong proof that the Disgrace and the imputation of this frailty had been more severely urged than Reason, Policy, or human Sympathy allow") under the mistaken Idea of applying a Remedy to "this Evil," now by the Statute the very endeavouring to conceal the Death of the Bastard Child is Evidence of Murther, unless she can contradict it by other Proof, and prove, at least by one Witness, that the Child was still-born.

" But, as we have seen, the Indictment needs not to be drawn specially: for the Act has not made a new Crime, but has prescribed what Evidence shall be taken as conclusive in this Case: and therefore it should seem, that if such Indictment conclude specially, and there is Evidence to repel the presumption of concealment, direct Proof of Murther is notwithstanding admissible to be left to the consideration of the Jury, as in other Cases.

J. Swan's Case.
Foot. 105.

" So in *Petty Treason*, as before has been observed, it being an aggravation of Murther,

" may

" may be proved, though there be but one Witness to
" the Fact, or though the Relation be not proved
" which constitutes the *Aggravation* of this species of
" *Murder.*

V. for this
Crime ANAL.
C. II. 1.
2.

" And so in general, where *Clergy* is taken away from
" an offence under circumstances, the offence, as at
" Common Law, may be proved under an Indictment
" charging those circumstances; they being only Sta-
" tute Aggravations of the offence.

" But as they are not *general* but *special Aggrava-*
" *tions*, essentially and specifically differencing the
" Punishment, if not laid, they cannot be *proved*;
" though if laid and not proved, the Common Law
" Judgement will pass on such offence detached from
" those circumstances which subject it to a greater
" Penalty: as in *Grand* or *Petit LARCENY*; *simple*
" or *compound*.

" And for these *special Aggravations*, as also for
" certain Crimes, there are distinct Terms which no
" circumlocution or apparent *synonyme* can supply: as
" *murdered* in an Indictment for that offence; *burgla-*
" *riously* for *Housebreaking* in the night, under the cir-
" cumstances which discriminate that offence; *felo-*
" *niously took and carried away*, on an Indictment for
" *Larceny*; *treasonably and against the Duty of his Alle-*
" *giance*, on an Indictment of *Higb Treason*.

" Thus

“ Thus no special Aggravation, which varieith the
“ prescribed Punishment, can be proved, if not ex-
“ pressly charged: but an offence properly charged
“ so as to determine its general Denomination may be
“ proved according to the determinate *Degrees of Cri-*
“ *minality* to which the Evidence shall extend: and
“ this points a characteristic difference between *civil*
“ Actions founded on *Contract*, and *criminal* Prosecu-
“ tions founded on *Delict*. A civil Contract is that
“ which the Terms of the Agreement duly interpreted
“ make it; and it is one entire simple thing not ad-
“ mitting of Gradations. A Crime, in its legal sense,
“ is an Act prohibited by Law under Penalty: and to
“ such Act, under definite circumstances, Penalties
“ differently modified may be annexed by the Legi-
“ lature. A Man, therefore, if called to answer for
“ a certain Crime, charged with the special circum-
“ stances of Aggravation, answers it according as
“ the Evidence shall apply; or, if generally laid,
“ answers it only in its lowest and simplest state.

“ And hence he shall not justify specially: for he
“ must, if this were admitted, either plead some-
“ thing which amounts merely to the general Issue, or
“ something the Proof of which would not discharge
“ him from the Indictment: the one is superfluous, and
“ rejected even in civil Actions, as tending to cir-
“ cuity

"cuity and delay; the other, manifestly inadmissible.

"As in *Murther on an*" Indictment *Self-defence* ought to be given in Evidence, and ought not to be pleaded.

"And on" Indictment of Murther *ex Malitia præcogitata*, "a Man shall not plead that he killed, but "not of *Malice prepense*, but on sudden Passion and "Quarrel: for this, if true, will not *discharge* the "Indictment; but only disprove the special Aggravations, and to do this is Matter of *Evidence* within "the Purview of the Indictment: and the *Malice* is "an Inference of Law from the Fact charged, which "may either be established, mitigated, or wholly done "away, according as the Proof shall appear on the "Defence.

"*Prima facie*" nothing "in the general Consideration of the Fact at large" can justify "one" Man's "killing another "under the protection of the same "Laws.

"The Malice therefore is in the Fact itself, without "justifiable cause shewn, or a legal excuse; and this "will be according to the circumstances proved, if" the Evidence is of killing without Provocation ("and "it lies on the Defendant to shew such Provocation as "the

" the Law allows in excuse) no particular Malice, as
 " we have seen, needs to be proved; but if the De-
 " fendant prove a Provocation by Assault, for in-
 " stance, of the deceased, the Presumption against
 " him from the Act of killing is now *rebuted*, until
 " the Prosecutor shew that such Provocation was sought
 " maliciously as a Colour: so where the Evidence
 " tends to prove" the killing an Officer, or that the
 party " who killed" was committing an unlawful Act,
 and that Death ensued to somebody on that Action:—
 or " if the Act" appears deliberate, " naturally" tending
 to the personal hurt of any one, " and presumably to
 " Death;" in these "several" Cases the Law implies
 the circumstance of Malice " disprovable by various
 " Evidence according to the general or special Facts
 " which support it;" and this Implication of the
 Law is in defence of Mankind: for all *Malice* (" which
 " in the legal sense is *a disposition to do an unlawful*
 " *Act*") is a secret Quality of the Mind: and it is the
 Fact only that appears and can be brought in Proof;
 and it is from the circumstance of Fact that a Man
 must collect the offence of the Mind, " and the legal
 " degrees of that offence:" now when a Man kills
 another, that is, *prima facie*, so ill-natured and
 bloody an Action, that it is presumed to be malicious
 " till the contrary be proved;" and therefore the
 " apparent" offender, to cover himself from the sup-
 position that the Law has made in Tenderness to Man-
 kind, must shew some " just Necessity, some" Pro-
 vocation, or some Accident in " justification, extenua-
 tion,

V. *supra*, 754.

762.

"tion, or" excuse of the Fact;" or if he cannot thus mollify or excuse the Action, the Supposition of Law remains, and he ought to be punished with certain Death.

" And" the Law, for the " necessary" Defence of its Officers, " and therein for the protection of Society, regardeth, as has been shewn, as *Murber*, " when committed on a known Officer, or person interposing avowedly to preserve the Peace, what would have been *Manslaughter* but for these circumstances; regardeth as *Murber* or *Manslaughter* in the " doing of any unlawful Act, what might have been " *Homicide by Misadventure*, had the Act been lawful: " inferreth Malice from the means and circumstances " of killing, which must be disproved according to " the circumstances, what will exculpate in one situation not being legally available in another; as in " throwing down rubbish in a solitary *Village* or in a " populous Town; it may be *Misadventure* in the " first instance; *Manslaughter*, though he give loud " Warning, and *Murther*, if without Warning, in " the other. And in the Case of Poison the presumption is irresistible, unless it can be shewn that " it was ignorantly given.

" All the points then of Justification or Excuse in " this and other instances of Indictment are properly " Matter of Evidence on the general Issue, according to the Nature of the Defence incumbent on the " party accused from the Facts proved. And whatever in civil Cases must have been pleaded (as *special Authority*, or *Self-defence*) here comes properly and " solely under the general Issue.

Surplusage—Variance—Inception and Continuation of Offence.

Par. 7.

Surplusage in the Style of the Court immaterial, if a Court having Jurisdiction appear on the Record: and so of other Surplusage in a Point not material.

Rex v. Lookup.
T. 7 G. III.
V. et Morgan,
III. 217—225.
Barres v. Constantine.
Cro. Jas. 32.
Hurry v. Watson. S. P. Tbef-
ford Summ. A.
1786, cor.
Slynnor, C. B.

“ If there be an Indictment of Perjury, and the Perjury be alleged to have been committed before Justices of Assize assigned to hear and determine all Treasons, Felonies, Trespasses, &c. whereas the original Cause on the Record is before Justices of Assize, the additional Words are but Surplusage: this may be collected from the Analogy of several Cases cited in the Margin.

Par. 8.

Litteral Variance in setting forth an Allegation in the Body of a Record immaterial, where it does not make another Word.

R. v. Beach.
Cwp. 229.

“ On a Conviction of Perjury in Arrest of Judgement a Variance was objected. That in the Affidavit on which the Perjury was assigned, the words were, that he (the Defendant) understood and believed, whereas in the Assignment of Perjury it was understood, omitting the s. The COURT discharged the Rule for the Reason intimated at the head of this Paragraph.

Par. 9.

Inception of Offence immaterial, if continued in the County where tried.

IV Comm. 305.
H. P. C. 507.
4 H. VII.
5 B.

R. v. Bartby.
Sp. Assiz. Bury,
1789.

“ Where Larceny is committed in one County, and the Goods carried into another, the offender may be indicted in either: for the offence is complete in both. But for Robbery, Burglary, and the like, he can only be indicted where the Fact was actually committed: for though the carrying away and keeping of the Goods is Larceny in the second County, (it being a continuation of the original taking) yet it is not Robbery or Burglary in that Jurisdiction: the Evidence of such Crime arising in the other Jurisdiction. And thus a person was convicted before Sir N. Grose, J. for stealing Goods in Norwich and conveying them into Suffolk.

CHAPTER XIV.

Of the ORDER of GIVING EVIDENCE in CRIMINAL CASES: and of WITNESSES, particularly circumstanced: and secondary Testimony.

" As we have laid before concerning Evidence in general, it is not regular to produce any Evidence without first opening it: and this Rule holds of course reciprocally, as well on the side of the Prisoner as of the Crown.

" No Observations ought to be made on the Prisoner's Evidence till he hath concluded to give all his Evidence: nor ought the Evidence for the Prosecution to be interrupted. But the Prisoner may ask Questions, reserving his observations.

" And a Prisoner is permitted in the summing up of the Judge to interrupt to rectify a Mistake.

" A Witness may refer to Notes taken at the time to assist his Memory: but must not read out his Evidence.

" At the Desire of the Prisoner Witnesses are ordered to be examined separately, and those not under Examination to be out of hearing.

L. of Ev. 279.
R. v. Rookwood.

Ibid. quæ supra.
Lord Mohun's Case.
IV. S. T. 975.
6.
R. v. Rookwood.
IV. S. T. 133, 44
R. v. Hampden.
III. S. T. 242.
249.

L. of Ev. Edi.
1717.
P. 233, 44
VI. III St. Tr.
R. v. Borofsky,
&c. 34 Car. II.

R. v. Charnock.
3 W. III.
Anno 1695.
IV. S. Tr. 9.

SECTION II.

Of the TESTIMONY of WITNESSES particularly
circumstanced in CRIMINAL CASES.*v. supra, 393.*

" We have already seen that *Accomplices* are the
" weakest of all Evidence, and in *capital Cases* the
" unsupported Evidence of such is incompetent to
" convict.

*Par. 2.**Accomplice.*

*Whether capable of Testimony by Pardon, though con-
victed of such Perjury as is a capital Felony.*

R. v. Thomas
Reilly and
Abraham Da-
vis, 4 Sept.
1787, O. B.

" On the Rehabilitation of Testimony a Decision
" was given which arose from an Indictment of Fe-
" lony, in forging Letters of Administration to the
" Effects of *James Lewis*, a Mariner, deceased, who
" had served on board the *Hannibal*, and to whom
" Wages were due at the time of his Decease.

" After calling other Witnesses to introduce the
" Charge, they called *Macdaniel*, who had been before
" convicted of the Forgery of these Letters in the
" Name of *Lewis* the supposed brother of the de-
" ceased: who produced in Court his *Pardon*, which
" was read, and by virtue of this pardon the Counsel
" for the Prosecution contended that he was now be-
" come a good and *babile* Witness.

" On the other side it was contended, that the Par-
" don only exempted from personal Penalties and
" Incapacities, but did not restore to Testimony, by
" which he might be enabled to affect the property,
" or the reputation, or the lives of others.

" The

" The Recorder * admitted the Evidence, and re- • ADAIR.
" served the legal Question touching its Competency for
" the Opinion of the Judges. He expressed himself,
" in the mean time, of opinion that this Species of
" Perjury having been made a capital Felony, the
" Perjury and its distinct consequences of being inca-
" pacitated from Testimony, as a part of the Pu-
" nishment, merged in the Felony, and it became,
" like other Felonies, *rehabilitable by Pardon.*

" And afterward, at the next Session, the Prisoner,
" who had been convicted, being ordered to the Bar,
" Mr. Justice WILSON informed him of the OPINION
" of the JUDGES on the QUESTION reserved, Whe-
" ther Macdaniel, being indicted and convicted of the
" same Offence, were, by virtue of the Pardon, com-
" petent to give Evidence against him on the Trial?

" That the twelve JUDGES were of opinion, that
" the Pardon not only absolved the Punishment, but
" restored the Competency, and that therefore the
" Testimony of Macdaniel was rightly admitted.

Par. 3.

Bail.

" Bail on a Recognizance *ad comparendum et re-*
spondendum et ulterius faciendum on a Misde-meanour,
" disallowed as Evidence, unless the Person of the
" Prisoner were first surrendered in discharge of the
" Bail, who till then have an Interest in his Acquittal.

Rex v. Hamp-
den.
111 S. T. 253.

Par. 4.

Juryman.

" A Juryman may be a Witness: but then he ought
" to be sworn as such, and give his Evidence openly.

L 11 3

" *Judges*

L. of Ev.
2 par. 8. Tr.
pe. P. 221.
2 Sid. 153.
Fitzjames v.
Moys.

*Par. 5.**Judge.*

R. v. Hacker.
Kels. 12.

" Judges on the Bench have been sworn as *Witnesses*
" against the Prisoner: but they did not again appear
" on the Bench during that Trial in which they were
" so sworn.

*Par. 6.**Wife.*

* R. v. the In-habits of Cliviger.
T. R. II, 263,
Hil. 28 G, III.
et vide infra.

" Whether a *Wife* might be *Evidence* against her
" *Husband*, even where the *Crimination* arises *collate-rally*, has been discussed already: the *Doctrine*
" there intimated has since been confirmed on an
" *Appeal from an Order of Sessions* in *affirmance* of an
" *Order of two Justices*, in the following Case:

Hut. 116.
St. Tr. 265,
269.
H. H. P. C.
301.
H. P. C. 431.
Rush. Coll.
P. II. Vol. I.
94—99.
Str. 663.
T. Raym. I.
Ventr. 244.
Co. Lit. 6 b.
2 R. Abr. 683.
pl. 4.
H. H. P. C.
301.
2 H. H. P. C.
279.
Brownl. 47.
2 Keb. 403.
pl. 12.
4 St. Tr. 808.
St. 633.

" The *Paupers* were removed by the *Order* from the
" Parish of *Anlezark* to the Parish of *Cliviger*, both
" in *Lancashire*; the *Marriage* with *James Whitehead*
" being the *Ground* of the *Removal* of *Margery*. On
" the *Appeal* the *Counsel* for the *Respondents* had
" proved the *Marriage*, and there rested their *Case*.
" The *Appellants* insisted that *James Whitehead* had a
" former *Wife* living at the time of his *Marriage* with
" the *Pauper Margery*, and still in *Life*: and for this
" they were permitted, at the *Sessions*, to examine the
" *Pauper James Whitehead*, himself: he, on his *oath*,
" denying any such *Marriage*, they offered to call
" *Ellen*, the supposed former *Wife*; and this *Evidence*
" the *Session* refused. They then went into *general*
" *Evidence of cohabitation and repuse*, and of their
" binding an apprentice by *indenture*, in which the
" said *James Whitehead* and *Ellen* set themselves forth
" to be *Man and Wife*.

" The

" The Question for the Court of course was, whether, under these circumstances, the said Ellen were a competent Witness, or not ?

" The Cases already mentioned were cited: and a recent Case, in which, on an Action brought by the Plaintiff as a *Femme sole*, for Goods sold, &c. the Defendant called the *Husband* as Witness to prove her a *married Woman*. The Plaintiff was *nonsuited*. On Motion to set aside the *Nonsuit*, BULLER, Justice, at first doubted, because in that Case the Husband had no Interest: but afterward agreed with the rest of the *Court* upon the broad ground adopted by them of the *impolicy* of permitting *Husband* or *Wife* to be Witness for or against the other. And the Authority of HALE was cited, that a Woman is not bound to give *Evidence* against another in *Theft* or other Crime in which her *Husband* is concerned, though it be material against the other, and not directly against her *Husband*.

Bentley and Cook.
Tr. 24 G. III.

" On the other side they contended that this Woman, Ellen, might clearly have proved her Marriage with James Whitehead, if she had been called before Evidence had been given of the Marriage with Margety: and that the circumstance of her being called first or last could not affect the Right to her Evidence.

L. N. P. 287.

" The COURT held that the *Wife* was NOT a competent Witness to prove against her *Husband* in

Testimony of Witnesses particularly circumstanced in Criminal Cases.

" this Case: not on the Ground of *Interest*: nor on
 " the Ground of its directly subjecting the Husband
 " to Punishment, as what she had then sworn could
 " not have been given in *Evidence* on a subsequent
 " Trial: but on the general Ground, that neither
 " Husband nor Wife shall be permitted to give Evi-
 " dence, even in *collateral Cases*, where the Evidence
 " of the one tends to criminate the other.

" *Grose*, Justice, farther added, that the Distinction
 " between COMPETENCY and CREDIT appeared by no
 " means accurately settled: that in many of the
 " Books the shade of difference was so light, that the
 " boundaries between them could hardly be perceived.
 " But that in all the Books which treat of EVIDENCE,
 " there are certain RULES laid down, the observance of
 " which is highly beneficial to the public. That among
 " these is the Rule relative to the Evidence of the
 " Husband against the Wife, or of the Wife against the
 " Husband: founded not on *Interest*, but *Policy*; by
 " which it is established that a Wife shall not give Evi-
 " dence in any degree to criminate her Husband: and
 " that accordingly Lord HALE says, that she shall
 " not be called even to criminate him indirectly. And
 " that this Rule seems to have governed all the Cases
 " from thence to the present time. For that the Case
 " in which *Gould*, Justice, admitted the *Evidence* of the
 " Wife, on a Claim of Title by Descent, to prove
 " Bigamy, which would have intercepted the Descent,
 " seems to have been the very Case in which, on far-
 " ther Deliberation on new Trial, *HOLT* declared
 " this Evidence inadmissible.

TITLE II.

Of Secondary Testimony; or, Hearsay in CRIMINAL
CASES.

" We have seen in general that *Hearsay* is not *Evidence*: but we have had occasion at the same time " to observe some Exceptions to this Rule, such as the " Proof of ancient Custom or Pedigree, where the " Nature of the Thing to be proved supposes a " failure of direct living Testimony. But these and " other Exceptions, which have their place in civil, do " not apply to criminal Cases: and therefore in these" the *Attestation* of the *Witness* must be to what he *knows*, and not to that only which he has *heard*; for a mere *hearsay* is no *Evidence*: for it is his *Knowledge* that must direct the Court and Jury in the Judgement of the Fact, and not his *Credulity*; for " Reception" of *Testimony* being but an Appeal to the Knowledge of another, if indeed he doth not know, he can be no *Evidence*. Besides, though a Person testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath: and if a man had been in Court, and said the same thing, but had not *sworn*, he had not been believed in a Court of Justice. Now Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first speech was without Oath, an Oath that there was such a Speech makes it no more than a bare speaking, " which cannot be of more worth derivatively than at first;" and so of no Value in a Court of Justice, where all things were determined under the solemnity of an Oath.

v. *supra*, 279,
80.

Besides, nothing can be more "indeterminate" than loose and wandering "Testimonies" taken upon the uncertain Report of the Talk and Discourse of others.

" If a Man swear to his *own Knowledge*, he must shew the circumstances, and incur the Risque of " *Confutation*: but if a Man were allowed to swear to " an *hearsay*, it would admit general Allegation, for " the Proof or Disproof of which no concomitant " particulars could be expected of the Witness: yet " on this Evidence many in almost every Reign prior " to the *Revolution*, and some great and excellent Men, " were deprived of Liberty, of Honour, and of " Life; and their Posterity consigned to Poverty and " Dishonour."

² Hawk. P. C.
431.
Holt, 236.
Skinn. 402.
Mod. 233.
R. v. Langhorn,
332.
R. v. Fitzhar-
ris, 761.—
802, 3.
111. S. T.
144, 5—
252.
IV. 33.

But although *Hearsay* be not allowed as *direct* Evidence, yet it may in *Corroboration* of a Witness's Testimony: to shew that he affirmed the *same* Thing on *other* occasions, and that the Witness is still consistent with himself; for such Evidence is only in support of the Witness that gives his Testimony upon Oath.

" And of this the chief effect usually is in criminal Prosecutions for some great personal Injury, where " the party prosecutes in the Name of the Crown: " that Case more especially rendering it material what " Representation was immediately made: and here, " though the *positive* Proof resulting from such Report " be indefinitely small (since if a party will accuse " falsely in a Court of Justice, the same party would
" hardly

" hardly hesitate to represent falsely to a Friend or Relation, in order to lay a ground and procure a *verisimilitude* to the Charge) its negative force is extremely great, since the want of being able to prove that complaint was made to any one recently after the supposed injury, is commonly and justly reputed destructive of all probability of the Charge.

Rex v. Knob
and Lane.
II. S. T. 414, 5.

" But *Hearsay* may be Evidence of *Inducement* in Matters that do not constitute the Crime, and are of a general Nature. As that there was a Plot, a Conspiracy, a Disaffection; but not to charge the Prisoner in particular.

II. S. T. 325.
R. v. Langhorn,
333.
III. 309.

TITLE III.

Of Witnesses discredited as to Part of their Testimony by the Party producing them.

" The *Prisoner* (and it is the same of the *Prosecutor*) shall not call Witnesses to impeach the Credit of any thing that has been said by his own Witness.

Rex v. College,
II S. Tr. 792.

CHAPTER XV.

Of IMPEACHMENT.

Comm. IV.
C. 19.

“ Having now treated of the chief Offences which
 “ fall under the Jurisdiction of the great or inferior
 “ Courts of Common Law in the ordinary course of
 “ proceeding, and having spoken of the Evidence
 “ applicable particularly to each, and touched upon
 “ the general Rules and Order of Proof, this Book
 “ respecting CRIMINAL ISSUES would be incomplete,
 “ were we to pass entirely in silence the Trial by IM-
 “ PEACHMENT, which is peculiar to the transcen-
 “ dant Authority of the HIGH COURT OF PARLIA-
 “ MENT.

“ This is sometimes for such Species of *High Treason* as would be the subject of an Indictment
 “ under the declaratory Statute of E. III. but when
 “ this happens the Articles differ so little from the
 “ Form of an Indictment, that unless in the circum-
 “ stance, for the greater solemnity, of the Charge
 “ being preferred by the COMMONS, the Trial of a
 “ Peer for such Treason is not materially distinguished,
 “ under these circumstances, from a Trial on a Bill
 “ found by a GRAND JURY.

“ But the most usual Subject of an IMPEACHMENT
 “ is some offence, or Series of Offences, of a Nature
 “ too extraordinary and complex for other Cognizance :
 “ and chiefly of political Delinquency in the Conduct
 “ of State Affairs, consisting in *Neglect, Treachery,*
 “ or *open Wrong*; or in a Combination of any or all
 “ of these : and it is in the Nature of a criminal
 “ APPEAL of the highest Order.

“ But

" But the *Forms* peculiar to this aweful Mode of
 " Trial are not to be particularly explained in this
 " Treatise: the *Evidence* is the proper Object of
 " our Attention here.

" And concerning this, the most comprehensive
 " Rule is, that whatever, upon general* Principles,
 " would or would not be Evidence before an inferior
 " Tribunal, will be admitted or rejected by this su-
 " preme Court: and accordingly there are repeated
 " instances of Evidence refused as inadmissible, on
 " general Grounds of Objection which would have
 " that effect on a Trial before a Jury. And this Rule
 " has been recognized* by one of the Honourable
 " Managers* in his introductory Speech, and exem-
 " plified in the Course of the Proceedings in the Trial
 " now depending in PARLIAMENT. Such Rules as
 " have an universal and primary Relation to the Dis-
 " covery of Truth and the just Security of the Party
 " accused being in their Nature recognized by every
 " Tribunal in a free and well-constituted State.

" That a Person shall not discredit his own Witness;
 " that he shall not offer Evidence of something said
 " when not upon oath against what is asserted on Oath;—
 " are Rules of *Evidence* which were urged, and seem
 " to have been admitted, on the *Impeachment* at present
 " depending.

* So at least it should seem. The Honourable Manager who opened the Impeachment is said to have entered into a philosophical Analysis of the Nature of Evidence, the Principles on which it was founded, the Grounds on which it ought to be admitted or rejected: and to have distinguished between such Rules of Evidence as were applicable to inferior Courts of

Law and those which were more congenial to the dignity of that extraordinary and supreme Court and better adapted to the purposes of substantial and general Justice. Who that has an Idea of the Speaker and of the subject does not regret the want of farther, and indeed complete, Information on this part of the Speech?

" But

H. St. T.
 V. 118. 127
 VI. 644.

* Mr. BURKE,
 V. Tr. of War-
 ren Hastings,
 Esq. late Go-
 vernor-general
 of Bengal.—
 Ridgeway.—
 p. 3.

“ But in subordinate Rules there is a material Difference between *Evidence* admitted on an *Impeachment* and *Evidence* admissible on an Indictment or Information.

Dr. Sacheverell's.

“ Thus we have seen that in a Prosecution in any of the inferior Courts for a *Libel*, the Words alleged to be libellous must appear on the Face of the Record, either in part or in the whole; and if not according to the *Tenour*, at least according to the *Purport*: and to charge the Conclusions or Inferences imputed to them, and give the Words in Evidence, would not be allowed.

IV. St. Tr.
775—966.

“ But in the celebrated Trial by *Impeachment*, to which Allusion was made in a former Part of this Work, the ARTICLES charged an imputing of odious Principles to the REVOLUTION, and a defaming and endeavouring to bring into Abhorrence the necessary Means of effecting it:—it was objected at the Trial, and after the Defendant had been found guilty on the *Impeachment*, it was more formally moved in ARREST OF JUDGEMENT, That no entire Clause of either of the Books or Sermons referred to in the IMPEACHMENT is specified or particularly set forth in any of the ARTICLES of IMPEACHMENT.

“ The HOUSE resolved, That by the Law and Usage of PARLIAMENT in Prosecution by IMPEACHMENT for High Crimes and Misdemeanours, by writing or speaking, the particular Words supposed to be criminal are not necessary to be expressly specified in such Impeachment.

CHAPTER XVI.

Of BILLS of ATTAINDER.

“ From BILLS of ATTAINDER little Illustration
“ can be expected of the *Principles of Evidence*: one
“ species in particular may be noticed, intended to
“ supply a defect of legal Proof.

“ Thus there not being two Witnesses, (which, as we
“ have seen, was absolutely requisite by the Statute)
“ who could be produced to convict Sir JOHN FEN-
“ WICK of Treason, in compassing the Death of the
“ King and adhering to the King’s Enemies, by con-
“ sulting and agreeing to send *Robert Ckarnock* to in-
“ cite the *French* King to invade this Kingdom, a BILL
“ of ATTAINDER was brought in, reciting the sub-
“ stance of the Indictment, and that of the said Con-
“ sult and Agreement some had been attainted; the
“ Delay of Trial obtained by Sir John Fenwick on
“ promise of an ingenuous Confession and Discovery;
“ his not having confessed or made Discovery, but
“ instead thereof that he scandalously charged divers
“ persons upon hearsay, endeavouring thereby to raise
“ Jealousy between the King and his Subjects, under-
“ mine the Government, and slife the real Conspi-
“ racy; and that *Cardell Goodman*, one of the Wit-
“ ness to prove the said Treason against Sir John
“ Fenwick, lately, and since one of the times on
“ which Sir John Fenwick would have been tried but

Fenwick's Cafe.
S. T. II.
181—193.

8 W. III c. 4.

“ for

*Observations and Objections in PARLIAMENT to the
passing of that BILL.*

" for the expectation of the Discovery aforesaid, had
" withdrawn out of the Kingdom, so that the said
" *Cardell Goodman* could not be had to give Evidence
" upon any Trial; pronouncing that of the said Treas-
" sons the said Sir *John Fenwick* is guilty; and enacting
" that he be and is convicted of High Treason, and
" that he suffer the pains of Death, and incur all the
" Forfeitures of a Person so attainted.

" And he did suffer accordingly: but not without
" considerable opposition in both Houses of Parlia-
" ment.

IV. ST. TR.
245.

259.

305.

" In the Arguments in the House of COMMONS,
" the Necessity of observing the primary Rules of
" Evidence, no less in Parliament than in any other
" Court, was strongly urged: and that Bills and
" Judgements of Attainder had been reversed in
" Parliament for no other Reason than because the
" Parliament had not proceeded according to such
" Rules: that whatever was said of the Power of
" Parliament must be understood of a just Power; and
" that it was no Diminution of the Dignity of that
" supreme constitutional Tribunal to say that they
" could not do what they could not justly do.* And
" when the Bill passed at length, in a full House, it
" was by a small Majority †.

" The

|| Morgan's
Essays, 1. p. 29.

* *Id possumus quod Jure pos-
sumus.*

† Only 33.

Ayes	189	{	345
Nees	156		

|| The Author of an *Essay* on
the *Law of Evidence* (which I
have seen, for the first time, this
Evening, the 11th of February,
1789) speaks of this Act as *not*
mu.b

" The principal Objections in the two Houses are
 " concisely and energetically recorded in the PRO-
 " TEST,|| of which these are the chief:

Die Merc.
 23 Dec. 1696.
 Protests.
 Vol. I. 185.

" That Evidence of Grand Jurymen of what was
 " sworn before them against Sir John Fenwick, as also
 " the Evidence of the Petty Jurymen of what was
 " sworn at the Trial of other men was admitted: both
 " which are against the Rules of Law:

" The information of the absent Witness was received
 " in writing, which is not by Law to be admitted:
 " and the prisoner, for want of his appearing face
 " to face, as required by Law, could not have the ad-
 " vantage of cross-examining:

" It did not appear, by any evidence, that Sir
 " John Fenwick, or any person employed by him,
 " had any way persuaded Goodman to withdraw him-
 " self: and it would be of very dangerous conse-
 " quence that any person so accused should be con-
 " demned: for that by this means a witness, who
 " should be found insufficient to convict a man, should
 " have more power to hurt him by his Absence than
 " he could have had, if produced *vivâ voce* against
 " him.

much to the credit of those who passed it. With respect to the Publication now quoted, I can at present only observe, that till this day I knew not of the existence or intention of such a Work.

¶ Signed by 41 Peers.

On the Reasons respecting the Evidence of the Grand Jury it does not appear that the House of Commons divided:

But against reading the Exa-

mination of Goodman the House divided:

Ayes 218

Noes 145—363

Against Evidence of what passed on another Trial,

Ayes 181

Noes 110—291

Against committing the Bill,

Ayes 182

Noes 128—310

And finally on the Question that the Bill pass,

Ayes 189

Noes 156—345

*M m m

CHAPTER XVII.

OF CRIMINAL PRESUMPTIONS.

As we are now at the Close of our observations respecting Evidence, on CRIMINAL ISSUES, it will not be inexpedient to add something to the remarks which have been made in a former part of this work on Presumptions in such Causes.

R. v. Mayhew,
Bury, Spr. A.
1789.

Recent Possession, especially of goods not according to the circumstances and habit of the life of the party charged, is a presumption against him.

R. v. Clark,
ibid. cor. Grefe,
J.

The Introduction of a *falsehood* into his Defence is a Presumption against him; for *Truth* is the proper shield of the guiltless: and this presumption is heightened if the falsehood is to be supported, as it almost necessarily must, by a Witness conscious of it.

R. v. Manning,
ibid.

If a servant, and still more a Common Carrier, hath Goods entrusted to him, and another be indicted for stealing the said goods, it ought to appear by some other Evidence, than that of the servant or Carrier that the Goods were taken out of his possession: for his testimony is in his own Discharge.

2 H. P. C. 290.
IV. Comm.
355.

Two Rules are laid down by Lord C. J. HALE, and these in the present state of the Administration of criminal Justice, to the perfecting of which that great man so eminently contributed, are rather hints to the student on the *Theory* than requisite to be called to remembrance in the practice: for we are not now in times in which they are likely to be overlooked. They are, never to indict of stealing the goods of an unknown person till it appear by due proof that a felony has actually been committed on those goods. Never to convict of Murder or Manslaughter, unless the fact can be proved to be done, or at least the body were found.

END OF THE SECOND VOLUME.

